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In The

# Supreme Court of the United States

WAYNE EMMETT MCKILLOP,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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143 pp

## QUESTION PRESENTED

The United States Forest Service issues special use permits to members of the public authorizing their use and enjoyment of national forest lands. The Tenth Circuit held that when the United States seeks to impose liability on a permit holder for fire suppression costs, the federal common law of contracts and the Supremacy Clause of the United States Constitution require displacement of a 180-day state notice of claim requirement because there is a six-year federal statute of limitations governing suits to recover such costs. Petitioner presents the following question:

> Whether the United States must comply with a state notice of claim requirement when seeking to impose liability under a special use permit.

## PARTIES TO THE PROCEEDING

All parties to the proceeding in the Tenth Circuit are listed in the caption of the Petition.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |
| Certiorari should be granted to resolve whether the United States must comply with state law notice of claim requirements when asserting a claim in the absence of any Congressionally authorized cause of action | 4 |
| A. The Tenth Circuit's decision directly conflicts with a decision from the Ninth Circuit | 8 |
| B. This Court should resolve the conflict between the Ninth and Tenth Circuits to prevent lower federal courts from improperly displacing state law | 12 |
| CONCLUSION | 15 |

## TABLE OF AUTHORITIES

Page

CASES

*Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213 (1997) ..... 6, 7

*Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) ..... 5, 6, 8, 16

*City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ..... 7

*Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) ..... 4, 6, 8

*Corcoran v. New York Power Auth.*, 202 F.3d 530 (2d Cir. 1999) ..... 9

*Felder v. Casey*, 487 U.S. 131 (1988) ..... 10, 12, 13, 14

*Jefferson Cty. Health Servs. Ass'n, Inc. v. Feeney*, 974 P.2d 1001 (Colo. 1998) ..... 10

*Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991) ..... 6

*King v. United States*, 301 F.3d 1270 (10th Cir. 2002) ..... 1

*King v. United States*, 53 F. Supp. 2d 1056 (D. Colo. 1999) ..... 1

*Miree v. DeKalb Cty.*, 433 U.S. 25 (1977) ..... 6

*O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79 (1994) ..... 6, 7, 11

*Robertson v. Wegmann*, 436 U.S. 584 (1978) ..... 15

*Sabin v. Berglund*, 585 F.2d 955 (10th Cir. 1978) ..... 9

*Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) ..... 6

TABLE OF AUTHORITIES – Continued

Page

*United States v. Boone*, 476 F.2d 276 (10th Cir. 1973) ..... 10

*United States v. California*, 655 F.2d 914 (9th Cir. 1980) ..... 9, 10, 11

*United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) ..... 6, 7, 11

*United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) ..... 6

*United States v. Studivant*, 529 F.2d 673 (3d Cir. 1976) ..... 14

*United States v. Swiss Amer. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999) ..... 5

*United States v. Williams*, 441 F.2d 637 (5th Cir. 1971) ..... 9

*United States v. Yazell*, 382 U.S. 341 (1966) ..... 6, 7

*Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966) ..... 7

*West Virginia v. United States*, 479 U.S. 305 (1987) ..... 6

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

UNITED STATES CONST. art. VI, cl. 2 ..... 1

16 U.S.C. § 480 ..... 10

16 U.S.C. § 497 ..... 2, 5, 9

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1291 ..... 3

28 U.S.C. § 2415(a) ..... 4

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2675 ..... 14

42 U.S.C. § 1983 ..... 12, 13

36 C.F.R. § 251.56 ..... 2, 5, 11

COLO. REV. STAT. § 24-10-101 ..... 3

COLO. REV. STAT. § 24-10-103 ..... 3

COLO. REV. STAT. § 24-10-109 ..... 1, 3, 14

COLO. REV. STAT. § 24-10-118 ..... 1, 3, 14

Fed. R. Civ. P. 12 ..... 3

OTHER AUTHORITIES

Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895 (1996) ..... 5, 7

Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 131 (2d ed. 1990) ..... 7

Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692 (Dec. 2001) ..... 7

19 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4518 p. 593 (1996) ..... 6, 16

20 Charles Alan Wright and Mary Kay Kane, *Federal Practice & Procedure Deskbook* § 63 n.5 (2002) ..... 5

## OPINIONS BELOW

1. *King v. United States*, 301 F.3d 1270 (10th Cir. 2002) (appears at page 1 of the Appendix).

2. *King v. United States*, 53 F. Supp. 2d 1056 (D. Colo. 1999) (appears at page 15 of the Appendix).

## STATEMENT OF JURISDICTION

The Tenth Circuit entered the Order at issue in this Petition on September 5, 2002. (App. at 1.) Mr. McKillop timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied on November 8, 2002. (App. at 75.) The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

COLO. REV. STAT. § 24-10-109 (2002) (App. at 106).

COLO. REV. STAT. § 24-10-118 (2002) (App. at 108).

16 U.S.C. § 497 (App. at 111).

36 C.F.R. § 251.56 (App. at 113).

## STATEMENT OF THE CASE

This case involves the issue of whether a state law notice of claim requirement should be displaced when the United States initiates a lawsuit in the absence of any Congressionally authorized cause of action.

The United States sued public school teacher Mr. Wayne McKillop for the costs of suppressing a 10,000 acre fire in the Pike National Forest. (App. at 86-87.) The fire was started accidentally by some of his students on a field trip in 1996, who were camping near the land and cabin leased by Mr. McKillop pursuant to a United States Forest Service Term Special Use Permit ("Special Use Permit"). (App. at 3.) The property owners affected by the fire sued, among others, Mr. McKillop and the United States. (App. at 4.) The United States filed cross-claims against the students predicated on state common law (negligence) and state statutory law, and a cross-claim against Mr. McKillop, stating: "Wayne E. McKillop is liable to the United States for its damages suffered as a result of the Buffalo Creek Fire pursuant to the terms of the Term Special Use Permit because the fire resulted from and related to his use of the Term Special Use Permit." (App. at 85-87.) The cross-claim against Mr. McKillop did not indicate whether it was based on state or federal law. (App. at 86-87.)

Mr. McKillop filed a motion to dismiss the United States' cross-claim against him pursuant to Fed. R. Civ. P. 12(b)(1).[1] (App. at 54.) As a public school teacher, Mr. McKillop is generally entitled to the protections afforded by Colorado's Governmental Immunity Act ("CGIA"), COLO. REV. STAT. § 24-10-101 *et seq.* for acts or omissions occurring during the course and scope of his employment. COLO. REV. STAT. § 24-10-103(4)(a), (5). The CGIA requires a notice of claim to be filed within 180 days of discovering an injury as a jurisdictional prerequisite to filing suit against a public employee when the claim lies in tort or could lie in tort. COLO. REV. STAT. § 24-10-109(1). Assuming compliance with this requirement, the claimant then is subject to whatever limitations period governs the underlying cause of action. COLO. REV. STAT. § 24-10-118(1)(a). It is undisputed that the United States did not file a notice of claim in this case. (App. at 54.)

The District Court granted Mr. McKillop's motion to dismiss, concluding that the United States' cross-claim was subject to the CGIA and therefore jurisdictionally barred for failure to file a notice of claim. The court reasoned that the "mere issuance of Mr. McKillop's Special Use Permit does not convert this claim into one under federal law." (App. at 58.)

The United States appealed to the Tenth Circuit Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291. According to the United States, it could have

[1] Mr. McKillop also asserted that the cross-claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), but the District Court denied that argument, and that issue is not relevant here.

brought its claim against Mr. McKillop under state or federal law. (App. at 6.) It argued, however, that it had chosen to pursue federal law as a basis for its cause of action and, as a result, it did not have to comply with the CGIA's notice of claim requirement. (App. at 6.)

The Tenth Circuit agreed, reversing the District Court's dismissal of the United States' cross-claim against Mr. McKillop. The court of appeals concluded that "[u]nder the analysis of *Clearfield Trust* [*Co. v. United States*, 318 U.S. 363 (1943)] and its progeny, the federal six-year contract statute of limitations provided by 28 U.S.C. § 2415(a) applies."[2] (App. at 13.) The court then held that the United States need not comply with the CGIA's 180 day notice of claim requirement. (App. at 13.) Mr. McKillop filed a petition for rehearing, which was denied without comment.

## REASONS FOR GRANTING THE WRIT

### Certiorari should be granted to resolve whether the United States must comply with state law notice of claim requirements when asserting a claim in the absence of any Congressionally authorized cause of action.

This Court has never addressed the precise issue presented here. As explained more fully below, the Court should resolve this issue because (i) the Tenth Circuit's

[2] In the District Court, the United States asserted that the three year statute of limitations applying to tort actions governed its cross-claim. (App. at 55.)

decision directly conflicts with a case decided by the Ninth Circuit on this very issue, and (ii) federal courts' displacement of state law under these circumstances involves substantial federalism and separation of powers concerns.

When, as here, the United States asserts a claim not specifically authorized by a federal statute, a court must decide two distinct questions.[3] First, the court must decide the source of the United States' right to assert the claim, *i.e.*, whether federal or state law controls. Second, if the source is federal, the court must then determine whether to apply state law as the rule of decision or develop a federal rule based on general principles of law.[4] *See United States v. Swiss Amer. Bank, Ltd.*, 191 F.3d 30, 43 (1st Cir. 1999).

Here, the Tenth Circuit concluded that federal law provided the source of the United States' right to enforce the terms of the Special Use Permit. That conclusion, however, "merely establishes a necessary, not a sufficient, condition for the displacement of state law." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). As

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[3] 16 U.S.C. § 497 authorizes the Secretary of Agriculture to allow use of the public lands, including national forests, "upon such terms and conditions he may deem proper." The regulations concerning special use permits were promulgated pursuant to that authority. *See* 36 C.F.R. § 251.56. However, neither the statute nor the regulations authorize the United States to initiate a cause of action in connection with special use permits.

[4] There is considerable scholarly debate about the basic legitimacy of federal courts' development of federal rules of decision, *i.e.*, "federal common law." 20 Charles Alan Wright and Mary Kay Kane, *Federal Practice & Procedure Deskbook* § 63 n.5 (2002), and Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895, 905 n.43 (1996) (collecting articles and texts on subject).

this Court elaborated in *Boyle*, displacement of state law will occur only if a " 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." 487 U.S. at 507 (internal citations omitted). Indeed, absent such a "significant conflict," it is presumed that state law will be adopted. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). Thus, federal courts displace state law only in "extraordinary" cases. *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 89 (1994).

Despite this rigorous standard, this Court has displaced state law in favor of a federal common law rule of decision on a few occasions. *See, e.g., Clearfield Trust*, 318 U.S. 363 (federal commercial paper); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973) (federal land acquisitions); *West Virginia v. United States*, 479 U.S. 305, 308-309 (1987) (interest to be charged due to late payment of a contractual obligation to the United States). More often than not, however, the Court has declined to displace state law when applying the federal common law. *See, e.g., Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001); *Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 226 (1997); *O'Melveny & Myers*, 512 U.S. at 89; *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979); *Miree v. DeKalb Cty.*, 433 U.S. 25, 32-33 (1977); *United States v. Yazell*, 382 U.S. 341, 357-58 (1966). The refusal to displace state law has become much more pronounced since the days of *Clearfield Trust. See* 19

Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4518 p. 593 (1996).[5]

This Court's reluctance to displace state law is based in part on the substantial separation of powers concerns implicated by such actions:

> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

*City of Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981), *citing Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). *See also Atherton*, 519 U.S. at 218; *Yazell*, 382 U.S. at 352. Similarly, federal courts' displacement of state law also flies in the face of states' rights to have their own laws enforced in areas not preempted by Congressional action. Paul Lund, *The Decline of the Federal Common Law*, 76 B.U. L. Rev. 895, 957 (1996) ("when a federal court asks unilaterally to 'displace' governing state

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[5] *See also* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1707 (Dec. 2001) ("More generally, recent cases such as *O'Melveny & Myers v. FDIC* have sought to rein in 'the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy' "); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 131 (2d ed. 1990) ("The conclusion reached in *Kimbell Foods* suggested a dramatic shift in the Court's attitude towards the role of federal common law when the proprietary interests of the United States are involved").

law, based on its own conceptions of proper and necessary federal policy, it runs headlong into substantial federalism and separation of powers objections") (footnote omitted).

Consequently, even when federal common law applies, federal courts should not displace state law on the basis of a perceived, assumed or slight conflict with federal law, but instead should carefully analyze whether it is necessary to displace state law in light of the particular claim asserted by the United States. The Tenth Circuit failed to do so here, creating a conflict with the Ninth Circuit and setting a precedent that leaves the doctrine of state law displacement dangerously unrestricted.

### A. The Tenth Circuit's decision directly conflicts with a decision from the Ninth Circuit.

The Tenth Circuit did not identify a conflict between state law and an "identifiable federal policy or interest," nor did it explain how application of the CGIA would "frustrate specific objectives" of federal legislation. *See Boyle*, 487 U.S. at 507. Instead, the court summarily concluded that requiring a notice of claim to be filed within 180 days after an injury was inconsistent with a federal statute of limitations and, therefore, the notice of claim requirement must be displaced.[6]

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[6] Although the Tenth Circuit stated that its decision was based on *Clearfield Trust* and its progeny (App. at 12-13), it appears that the decision is actually based on the Supremacy Clause of the United States Constitution. (App. at 13: noting that if a conflict between federal and state law exists, the federal "limitation" will prevail under the Supremacy Clause). However, once the Tenth Circuit decided that the Special Use Permit mandated reliance on federal law, the decision

(Continued on following page)

The conclusion and the way it was reached directly conflict with a factually similar, and legally indistinguishable, decision from the Ninth Circuit, *United States v. California*, 655 F.2d 914 (9th Cir. 1980). In *California*, the United States sought to recover the costs of fire suppression from a state employee. To do so, it borrowed a state statute imposing liability for creating fire-related damages, but failed to file a notice of claim as required by California law. *Id.* at 916. As here, the United States argued that it should not be subject to the notice of claim requirement.[7]

In resolving this issue, the Ninth Circuit weighed the relative interest of adopting state law against the existence of any potential conflict with a federal interest. *Id.* at 919-20. As here, there was no indication that state law generally provided an inadequate remedy for the United States. Nevertheless, the Government relied on the federal six-year statute of limitations for fire-related causes of action "as indicative of unique federal interests which would be infringed by the imposition of California law in

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to adopt or displace state law does not implicate the Supremacy Clause. *See Corcoran v. New York Power Auth.*, 202 F.3d 530, 538 (2d Cir. 1999).

[7] In *California*, as here, the court held that federal law provided the source of the United States' right to seek recovery for its fire-suppression costs. *California*, 655 F.2d at 917. However, such a conclusion is not mandated under these circumstances. *United States v. Williams*, 441 F.2d 637, 643 (5th Cir. 1971) ("the Supreme Court has long recognized that, in the absence of a contravening federal statute or policy, suits by the Government to protect its proprietary interests in land are local in nature") (citations omitted); *Sabin v. Berglund*, 585 F.2d 955, 957 (10th Cir. 1978) (Secretary of Agriculture represents "the interest of the United States as a proprietor" when administering the forest under 16 U.S.C. § 497).

this case." *Id.* at 917. The Ninth Circuit rejected that argument, noting that it had found "no indication in the legislative history of that statute . . . of any federal policy or program which would be frustrated by requiring compliance with California's more restrictive time requirements."[8] *Id.* at 919.

As the Ninth Circuit noted in *California*, the state has an interest in having its own law applied, especially because states maintain concurrent jurisdiction over national forests. *Id.* at 919, *citing* 16 U.S.C. § 480. Moreover, it recognized, based on a Tenth Circuit decision, that suits seeking to recoup fire suppression costs are instituted to protect proprietary interests and are therefore local in nature. 655 F.2d at 919, *citing United States v. Boone*, 476 F.2d 276 (10th Cir. 1973) (federal government is authorized to file suit pursuant to state fire suppression costs statute). Notice of claim requirements also significantly benefit states by allowing for early investigation and prompt resolution of claims, and the ability to correct mistakes. *See Jefferson Cty. Health Servs. Ass'n, Inc. v. Feeney*, 974 P.2d 1001, 1003 (Colo. 1998); *see also Felder v. Casey*, 487 U.S. 131, 157 (1988) (O'Connor, J., dissenting) (noting that notice of claim statutes serve several important purposes).

The Ninth Circuit concluded that the claim filing statute did not frustrate any federal policy or program, nor was it "aberrational" or "hostile" to federal interests.

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[8] The court also recognized that claim filing statutes are not statutes of limitation, but instead amount to an element of a cause of action against a state employee. *California*, 655 F.2d at 918.

*California*, 655 F.2d at 920. Therefore, the court declined to displace state law generally, or the notice of claim statute, in connection with the United States' lawsuit. According to the court, it would be inappropriate to allow the Government to borrow only those aspects of state law which supported its cause of action and ignore those that did not. *Id.* at 919.

Here, the United States attempted to distinguish *California* because that case did not involve the enforcement of a Special Use Permit. That fact, however, does not distinguish the case if one assumes that federal law provides the source of the United States' right to recoup fire suppression costs. Regardless of whether the United States is attempting to impose liability by borrowing a state statute or enforcing a Special Use Permit, the question is whether state law significantly conflicts with a federal interest or program such that it must be displaced. *O'Melveny & Myers,* 512 U.S. at 85.

Contrary to the United States' argument, the existence of the Special Use Permit only bolsters the conclusion that state law should not be displaced. The regulations authorizing the issuance of Special Use Permits require the permit holder to "pay the United States for all injury, loss, or damage, including fire suppression costs, *in accordance with existing Federal and State laws*." 36 C.F.R. § 251.56(d) (emphasis added). Under these circumstances, this Court has held that state law should apply. *See Kimbell Foods, Inc.*, 440 U.S. at 731-32 (state law should govern the controversy where the applicable federal "regulations suggest that state rules determine" the issue.) The most logical application of this regulation under the current circumstance would be to apply state law, including the notice of claim requirement, to the

United States' action, but allow the United States to rely on the appropriate federal statute of limitations. Such a result would be consistent with the regulation's mandate, as well as general concerns of federalism and separation of powers. Rather than comply with both federal and state law as the regulation requires, however, the United States now has the choice to sue under federal *or* state law in the Tenth Circuit.

The Ninth Circuit reached the right result because it analyzed the important state interests at stake and did not create a false conflict between a federal statute of limitations and the state's notice of claim statute, as the Tenth Circuit did here.

### B. This Court should resolve the conflict between the Ninth and Tenth Circuits to prevent lower federal courts from improperly displacing state law.

Not only does the Tenth Circuit's decision here create a conflict between the circuits, it also sets a dangerous precedent for other lower federal courts because the Tenth Circuit abandoned necessary restrictions imposed by this Court in determining whether to displace state law. The Tenth Circuit's decision is all the more problematic because this Court has never directly addressed the precise issue raised by this case.

However, an important aspect of the issue presented here – whether notice of claim requirements actually conflict with statutes of limitations – was addressed in the concurring and dissenting opinions in *Felder*. There, the majority held that state notice of claim requirements are preempted by 42 U.S.C. § 1983, even when litigants filed

such actions in state court, because such requirements conflict with the remedial objectives of Section 1983 and would produce different outcomes in federal civil rights litigation depending on the forum selected by the plaintiff.[9] *Felder*, 487 U.S. at 138.

In his concurring opinion, Justice White argued that preemption was warranted because notice of claim requirements "effectively truncated the applicable limitations period." *Id.* at 155.[10] Justice White concluded that the litigant had only four months to investigate the claim, as opposed to the two to three years which would otherwise apply under the pertinent limitations period.

In dissent, Justice O'Connor stated that "the concurrence is mistaken in treating this notice of claim requirement as a statute of limitations." *Id.* at 162. While noting that a particularly burdensome notice of claim requirement "could effectively act as a statute of limitations," the facts present in *Felder* justified no such finding. *Id.* at 161. On the contrary, the Wisconsin notice requirement was less burdensome than filing suit, which the plaintiff obviously was able to do. *Id.* at 162.

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[9] The majority's holding in *Felder* is inapplicable here because Congress has not enacted a statute with a remedial purpose which runs counter to the purpose of the CGIA, nor is there any danger (as in *Felder*) of divergent results based on the forum which is selected by the litigant.

[10] The Wisconsin notice of claim statute at issue in *Felder* was substantially different than the CGIA in that the Wisconsin statute required litigants to file suit within a short period of time after the local governing body disallowed the claim, whereas the CGIA contains no such limitation, but instead adopts the appropriate statute of limitations. 487 U.S. at 142-43.

Other courts have similarly recognized the distinction between a notice of claim provision and a statute of limitations. *United States v. Studivant*, 529 F.2d 673, 676 (3d Cir. 1976). This difference is explicitly recognized in the CGIA, which states that the limitations period for the underlying claim is determined by the nature of the action. COLO. REV. STAT. § 24-10-118(1)(a).

Moreover, the CGIA's notice requirement is not burdensome at all. *See* COLO. REV. STAT. § 24-10-109(2)(a)-(e) (notice must contain name and address of claimant and attorney (if any), a concise statement of the factual basis for the claim, the name and address of the public employee involved, if known, a concise statement of the nature and extent of the alleged injury sustained, and a statement of the amount of monetary damages requested). And unlike the typical civil rights litigant at issue in *Felder*, the United States will likely receive advance notice of any facts giving rise to a claim based on a forest fire in light of the Federal Tort Claims Act, 28 U.S.C. § 2675, which (like the CGIA) requires a notice of claim to be filed as a prerequisite to a lawsuit against the United States.

Justice O'Connor concluded her dissent in *Felder* by noting that the majority preempted a state statute based on nothing more than "inconsistencies between Wisconsin's notice of claim statute and some ill-defined federal policy that Congress has never articulated, implied, or suggested, let alone enacted." 487 U.S. at 163.

The Tenth Circuit's decision here is even more egregious because there is no federal statute authorizing the

United States' cross-claim against Mr. McKillop and the court failed to identify any federal policy sufficient to warrant displacement of the CGIA.[11] This is especially true given that, as the United States conceded below, it could have chosen to sue Mr. McKillop under state law. (App. at 6: "The government further argues that it was entitled to bring its claim under both state and federal law . . . . "). Indeed, the United States asserted state negligence claims against the students who allegedly started the fire. (App. at 85-86.)

Even assuming that the notice of claim does pose some conflict with the underlying purpose of the federal statute of limitations, it certainly does not rise to the level of a "significant conflict." The Government would have to comply with the notice of claim requirement in very few circumstances, *i.e.*, those cases in which it had issued a Special Use Permit to a public employee who used the permit in the course and scope of his or her employment.

## CONCLUSION

Regardless of whether one agrees with the result reached here, the Tenth Circuit's failure to engage in the appropriate analysis authorizes lower federal courts to develop federal common law and displace state law

[11] That the United States failed to comply with the CGIA and its claim is therefore barred is not relevant to determining whether the notice of claim provision should be displaced. *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) ("[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation").

without due regard for states' interests and the limited role of the judiciary in developing law. 19 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4518 p. 587 (1996) ("[t]he adoption of the law of the forum state as federal common law also is thought to be consistent with principles of comity and federalism"). Nevertheless, absent specific guidance from this Court concerning the appropriate principles to use in analyzing whether a conflict between state law and federal interests exists, the Tenth Circuit's decision may be seen as an acceptable way in which to address these important issues. *See Boyle*, 487 U.S. at 508 (stating that in some cases the entire body of state law is displaced, while in others only particular elements are superseded).

This leaves open the possibility, as happened here, that the United States will be allowed to displace state law merely because that law stands as an obstacle to its recovery, not through any hostility by the state, but instead because of the United States' failure to act.

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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# APPENDIX

Page

Tenth Circuit opinion ..... App. 1

United States District Court Order ..... App. 15

United States District Court Judgment ..... App. 71

Tenth Circuit order denying rehearing ..... App. 75

United States' Amended Answer to Third Amended Complaint and Cross-Claims Against Co-Defendants McKillop, Soares, Messer, Martinez, Glandon and Lacey ..... App. 77

Term Special Use Permit ..... App. 90

Colo. Rev. Stat. § 24-10-109 ..... App. 106

Colo. Rev. Stat. § 24-10-118 ..... App. 108

16 U.S.C. § 497 ..... App. 111

36 C.F.R. § 251.56 ..... App. 113

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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JERRY KING, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant-Cross Claimant-Appellant,

v.

WAYNE EMMETT MCKILLOP,

Defendant-Cross Defendant-Appellee.

No. 00-1486

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 97-B-341)**

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(Filed Sep. 5, 2002)

Alisa B. Klein, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., (Stuart E. Schiffer, Acting Assistant Attorney General, Thomas L. Strickland, United States Attorney, and Mark B. Stern, Department of Justice, with her on the briefs), for Defendant-Cross Claimant-Appellant.

Colleen A. O'Laughlin (William J. Kowalski and Mark Wiletsky with her on the brief), of Caplan and Earnest LLC, Boulder Colorado, for Appellee.

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Before **KELLY** and **HOLLOWAY**, Circuit Judges, and **SHADUR**, District Judge.*

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**HOLLOWAY**, Circuit Judge.

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## I

The third amended complaint (hereafter the complaint) in the instant suit alleges jurisdiction of this action for fire damages against the United States and others being pursuant to the Federal Tort Claims Act, 28 U. S. C. §§ 2674 and 1346(b). Appellant's Appendix (Aplt. App.) at 1.

In the first claim for relief, the complaint averred that the Government was negligent in that it knew, or should have known, that the Pike National Forest in Colorado was in an unusually high condition of combustibility and that a fire ban should have been ordered. *Id.* at 8. The central ruling to this appeal is the dismissal of the Government's cross claim against defendant Wayne Emmett McKillop (McKillop), which the Government appeals. The cross claim against McKillop alleges he is liable to the

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* The Honorable Milton I. Shadur, United States District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

Government for damages suffered as a result of a Buffalo Creek fire in the Pike National Forest. The liability of McKillop is averred to arise pursuant to terms of a Term Special Use Permit (the permit) obtained by McKillop from the Forest Service. Aplt. App. 26. He is alleged to be liable for damages suffered as a result of the fire, his liability to the Government arising "because the fire resulted from and related to his use of the Term Special Use Permit." *Id.* at 29.

The general factual background for the suit, drawn essentially from the Memorandum Opinion and Order on appeal and not in dispute, was as follows. On May 18, 1996, a fire began in the Pike National Forest near Buffalo Creek in Jefferson County, Colorado. The fire destroyed property and buildings owned and occupied by plaintiff Jerry King and several other people. The fire is alleged to have been started by several students of defendant McKillop who were on a field trip supervised by McKillop, a teacher for Community Involved Charter School (CICS). McKillop invited sixteen of his students to a cabin located on about one acre of land for which McKillop and his wife held a Term Special Use Permit issued by the United States Forest Service. *See id.* at 54-61. Some of the students slept in the cabin, while several others camped in a tent and built a campfire on land adjoining McKillop's site. The district judge found, *inter alia,* that McKillop used the property covered by the permit for the school camping trip; and that during the camping trip, the forest fire was started as a result of a camp fire built by the students on the camping trip. *Id.* at 108. Under these circumstances, the judge concluded that the damages claimed by the Government resulted from and were related to the permit. *Id.* Consequently the district judge denied McKillop's Rule

12(b)(6) motion directed to the Government's cross claim three. *Id.* at 108.

Owners of the destroyed property had brought suit in the United States District Court against McKillop, the students alleged to have built the campfire, CICS, the school district, and the Government. In the claim asserted against the Government there was an averment that the Government was liable for negligence in connection with a fire hazard. Two insurance companies intervened as plaintiffs. The Government filed cross claim three against McKillop, asserting a claim for damage to the forest as well as fire suppression costs under the permit. *Id.* at 29-30, 57. Other claims were settled or dismissed, and the only claim before us on appeal is the Government's cross claim three against McKillop. The court granted McKillop's Fed.R.Civ.P. 12(b)(1) motion to dismiss that cross claim for lack of jurisdiction due to failure to file a timely notice within 180 days in accordance with Colorado law. Aplt. App. 103-04, 107. The Government now appeals that dismissal.

## II

The motion for dismissal was granted because the Government had not complied with the 180 day notice requirement of the Colorado Governmental Immunity Act (CGIA), Col. Rev. Stat. §§ 24-10-101, *et seq.* The court held that such failure deprived it of jurisdiction. Aplt. App. 107, 115. We review de novo such a dismissal for lack of subject matter jurisdiction. *U.S. West, Inc. v. Tristani,* 182 F.3d 1202, 1206 (10th Cir. 1999).

Section 24-10-118 of the CGIA provides that where a plaintiff sues a public employee such as McKillop, the

employee is immune from claims arising from the performance of his duties, if such claims lie in tort or could lie in tort, unless the act or omission causing injury was "willful and wanton." The district court found, however, that a reasonable jury could find that McKillop's actions were "willful and wanton," and therefore did not grant the Rule 12(b)(1) motion on this basis. Aplt. App. 25-28.

However, a second section of the CGIA, § 24-10-109, includes a notice requirement that must be met even if the conduct was "willful and wanton." This section provides that a public employee acting in the scope of his duties may be sued only if notice is given within 180 days of the plaintiff's learning of the injury. The notice requirement states in pertinent part:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a *jurisdictional prerequisite* to any action brought under the provisions of this article, and failure of compliance shall forever bar such action.

Col. Rev. Stat. § 24-10-109(1) (emphasis added). It is undisputed that the Government did not give such notice. The district court therefore held that it lacked jurisdiction over the Government's cross claim against McKillop and granted McKillop's Rule 12(b)(1) motion on this basis.

The Government contends that its claim was brought in contract pursuant to federal law and premised on the Term Special Use Permit and, as a federal claim, it is not subject to the CGIA's limitations. Brief for the Appellant at 11, 17; Reply Brief for the Appellant at 3. Therefore, the Government urges the applicability of the federal 6 year limitations period of 28 U.S.C. § 2415(a), which governs actions founded on any contract, express or implied in law or fact, and which the Colorado statute cannot supplant. The Government further argues that it was entitled to bring its claim under both state and federal law, not just state law as McKillop argues. *Id.* at 5-6. On appeal, the Government argues only for its federal law claims.

The district court construed the Government's cross claim against McKillop as only a state law tort claim:

> The United States' cross-claim against Mr. McKillop is properly construed as a state tort claim alleging damages as a result of McKillop's alleged negligence. The United States does not dispute that its claim lies in tort or could lie in tort. Furthermore, the United States has set forth no claim under federal law.

Aplt. App. 106A (Memorandum Opinion and Order). We must disagree with the district judge's interpretation of the Government's cross claim.[1]

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[1] Here the district judge below acknowledged that "if the claim of the United States was a claim in contract based upon the permit, then of course the [Colorado] Governmental Immunity Act would not apply." Aple. Supp. App. 39 (hearing on motions).

The Government disputes the district judge's construction of its cross claim, arguing that the claim was asserted to enforce the terms of the permit which was issued pursuant to federal regulations, citing 36 C.F.R. § 251.56(a)(i) & (ii). Brief for the Appellant at 10. The regulations, the Government contends, require that permit holders "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer. . . . " *Id.* (citing 36 C.F.R. § 251.56(d)(1)). Therefore, the Government argues that its cross claim against McKillop is governed exclusively by federal law. *Id.* at 12. McKillop counters that the Government waived this argument by failing to raise it with sufficient specificity in the district court.

## III

### A

### *Whether the Government Raised This Argument in the District Court*

As noted, the district court read the Government's cross claim as raising only a state tort claim. Therefore, McKillop argues, the Government waived its argument that it was bringing a federal claim. It is a general rule that this court will not consider an issue on appeal that was not raised below. *Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992).

The Government asserted its cross claim against McKillop in its Amended Answer to Third Amended Complaint and Cross-Claims, Aplt. App. 29 (Third Claim

for Relief), under which appears the explanatory parenthetical "Liability under Term Special Use Permit." Paragraph 14 [2] alleges:

> Wayne E. McKillop is liable to the United States for its damages suffered as a result of the Buffalo Creek Fire *pursuant to the terms of the Term Special Use Permit* because the fire resulted from and related to his use of the Term Special Use Permit.

*Id.* (emphasis added). The Government explained its reasoning more fully in its Response to McKillop's Motion to Dismiss Cross-Claim. Aplt. App. 38-43. There, the Government acknowledged that the third claim for relief, discussed above, was its only claim asserted against McKillop. *Id.* at 40 n.1. The Government cited 28 U.S.C. § 1345 as authorizing its claim. *Id.* at 39. The Government also cited 28 U.S.C. § 2415(b) as providing that the relevant statute of limitation is six years. *Id.*

Section 1345 is not as helpful to the Government's case as its response suggests. Section 1345 provides that the district courts have original jurisdiction of such civil actions, suits or proceedings commenced by the United States or by any agency or officer thereof, rather than giving the Government a cause of action. If the Government has a federal cause of action, it must arise from some other source. Section 2415(b) provides that the federal statute of limitations for claims brought in tort is generally three years, though "an action to recover damages

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[2] There are actually two paragraphs numbered 14, apparently due to a typographical error.

resulting from fire to . . . lands" of the Government is six years. Section 2415(a) provides that the statute of limitation for "every action for money damages brought by the United States . . . which is founded upon any contract . . . " is also six years. The Government's citation to § 2415(b) therefore might be understood as explaining that the statute of limitations, even if the action lies in tort, is six years.

The Government cited two cases in which relief was sought under federal law, *United States v. Indep. Sch. Dist. No. 1 of Okmulgee County,* 209 F.2d 578, 580-81 (10th Cir. 1954), and *Felder v. Casey,* 487 U.S. 131, 144-46 (1988). *Indep. Sch. Dist. No. 1,* which closely parallels this case, is instructive. There, the Government paid money to the school district under a contract requiring the school district to serve school lunches to students and to keep certain records. When an audit revealed that the district had not kept adequate records, the Government sued to recover overpayments. We noted that the funds "were disbursed to a subdivision of the state under authority of federal law and in the exercise of a constitutional function." 209 F.2d at 580. We discussed the analysis of *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), and applied it to reject the state law defense and hold that the Government could recover such funds under controlling federal law. *Id.* at 580-81.

We note that the Government's statement of its claim made here did not rely on Colorado law, but only federal law. Aplt. App. 39-40 (citing 28 U.S.C. § 1345, 28 U.S.C. § 2415(b), 36 C.F.R. § 251.50, *et seq.*). The Government's argument in its response, Aplt. App. 39-40, also made clear that it sought a remedy under federal law, rather than under state tort law. Like the plaintiffs in *Indep. Sch. Dist.*

*No. 1,* the Government here relied on a contract, the special use permit, entered into pursuant to federal law. Aplt. App. 40-41.

We believe the Government's citation to *Indep. Sch. Dist. No. 1* and *Felder,* particularly in light of the other statements indicating that it was raising a claim under the terms of the permit and under federal law, adequately indicated that the Government was asserting a federal contract claim against McKillop. We hold that this argument was fairly raised below.

**B**

*Whether the Clearfield Trust Analysis Prevents Application of the CGIA*

The Government makes its claim in contract pursuant to the terms of the special use permit. Therefore, the Government argues, the *Clearfield Trust* analysis requires that federal law governs and that the CGIA cannot be applied. The district court did not reach this issue, but instead analyzed the Government's claim solely as a tort claim brought under Colorado state law. As explained below, we believe the Government's cross claim against McKillop was brought to enforce a right arising basically under federal contract rights.

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . . " United States Constitution, art. IV, cl. 3. Congress has authorized the Secretary of Agriculture to issue permits to occupy and use national forest land under such terms and conditions as she deems proper. 16 U.S.C. § 497. Pursuant to this authority, the Secretary has

promulgated regulations providing for the issuance of permits such as that issued to McKillop. 36 C.F.R. § 251.56(a) (1995). Under these regulations, permit holders such as McKillop "shall pay the United States for all injury, loss, or damage, including fire suppression costs, in accordance with existing Federal and State laws," and must "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy." § 251.56(d) & (d)(1). The permit issued to McKillop provides that "[t]he holder shall be liable for any damage suffered by the United States resulting from or related to the use of this permit, including damages to National Forest resources and costs of fire suppression." Aplt. App. 57 (permit, (V)(C)).

The cross claim averred that McKillop paid the federal government an annual fee of $512.00 for the permit covering his cabin site. Aplt. App. 26-27, 61. The district court's Memorandum Opinion and Order characterized the permit as a lease agreement between McKillop and his wife, and the Forest Service. Aplt. App. at 102 ("The purpose of the Permit was to lease U.S. Forest Service land to Mr. McKillop for recreational use."). We have previously held that such a permit is a contract. *Anderson v. Eby,* 998 F.2d 858, 863 (10th Cir. 1993). In seeking relief according to the terms of the permit, the Government sought compensation for "damage . . . resulting from or related to the use of" McKillop's permit. The permit's terms make no reference to negligence or other bases for liability characteristic of a tort claim. We therefore conclude that the Government's cross claim against McKillop is a contract claim. We likewise conclude that the permit

whose terms the Government seeks to enforce was issued pursuant to authority that

> had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of [Colorado] or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.

*Clearfield Trust,* 318 U.S. at 366 (citations omitted).

In *Independent Sch. Dist. No. 1,* this court said that, while it was not entirely clear which contract theory the Government was pursuing – a claim for money had and received, or unjust enrichment – the remedy was under federal common law. The federal common law of contracts is well developed. *See, e.g., Clearfield Trust,* 318 U.S. 363 (suit by Government for reimbursement in connection with a check issued pursuant to a federal contract and presented to Clearfield Trust with a forged endorsement); *Independent Sch. Dist. No. 1,* 209 F.2d 578 (Government's suit to recover overpayments made under a federal program was governed by federal common law). Here, the regulation established pursuant to congressionally-delegated authority contemplates that the terms of the permit may be enforced, not only under state law, but under federal law as well. 36 C.F.R. § 251.56(d). ("Holders shall pay the United States for all injury, loss, or damage including fire suppression costs in accordance with existing Federal and State laws.").

Under *Clearfield Trust,* application of federal law to contract disputes is favored. *Boyle v. United Technologies,* 487 U.S. 500, 504 (1988) ("We have held that obligations to

and rights of the United States under its contracts are governed exclusively by federal law.") The Supreme Court "has consistently held that federal law governs questions concerning the rights of the United States arising under nationwide federal programs." *United States v. Kimbell Foods,* 440 U.S. 715, 726 (1979). And, of course, where federal and state laws are in conflict, the Supremacy Clause of the United States Constitution requires that the federal limitation prevail. United States Constitution, art. VI, cl. 2.

We are convinced that the Government's cross claim against McKillop was essentially a contract claim for liability under the Term Special Use Permit, although a negligence claim against others (students) was averred. Aplt. App. at 28. The cross claim against McKillop was based on his liability under the clear provisions of the Term Special Use Permit. Aplt. App. 29. ("McKillop is liable to the United States for its damages suffered as a result of the Buffalo Creek Fire pursuant to the terms of the Term Special Use Permit because the fire resulted from and related to his use of the Term Special Use Permit."). *Id.* Under the analysis of *Clearfield Trust* and its progeny, the federal six year contract statute of limitations provided by 28 U.S.C. § 2415(a) applies.

We therefore hold that the district court erred in granting McKillop's Fed.R.Civ.P. 12(b)(1) motion on the basis of Colorado's 180 day notice requirement in the CGIA. Accordingly the Government's contract claim under the permit is not time-barred, the notice that the CGIA would have required did not have to be given here, and the district court has jurisdiction to entertain this claim.

## IV

The district court's dismissal of the Government's cross claim against McKillop on the basis of Colorado law is therefore REVERSED and this cause is REMANDED to the district court for further proceedings.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Lewis T. Babcock

Civil Action No. 97-B-341

JERRY KING, GAIL KING, CURT ROGERS, AIMEE KING-ROGERS, DAVID McGUIRE and JENNIFER McGUIRE,

Plaintiffs,

v.

UNITED STATES OF AMERICA; COMMUNITY INVOLVED CHARTERED SCHOOL; JEFFERSON COUNTY SCHOOL DISTRICT R-1; WAYNE EMMETT McKILLOP; NATHAN SOARES, ELI MESSER; LONEY MARTINEZ; TROY GLANDON; DUSTIN LACEY; JANE ROE 1; JANE ROE 2, and JANE ROE 3,

Defendants.

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SCOTTSDALE INSURANCE CO., as Subrogee of LINDA FARRIS,

Plaintiffs in Intervention,

v.

WAYNE EMMETT McKILLOP; NATHAN SOARES, ELI MESSER; LONEY MARTINEZ; TROY GLANDON; DUSTIN LACEY, by and through their respective parents and/or guardians,

Defendants.

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COLORADO CASUALTY INSURANCE COMPANY, as Subrogee of Barbara McCabe; and BARBARA McCABE,

Plaintiffs in Intervention,

v.

COMMUNITY INVOLVED CHARTERED SCHOOL; JEFFERSON COUNTY SCHOOL DISTRICT R-1; WAYNE EMMETT McKILLOP; NATHAN SOARES; ELI MESSER; LONEY MARTINEZ; TROY GLANDON; DUSTIN LACEY; JANE ROE 1; JANE ROE 2; and JANE ROE 3,

Defendants.

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MEMORANDUM OPINION AND ORDER

(Filed May 28, 1999)

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Babcock, J.

Pending are Fed.R.Civ.P. 12(b)(1) and (6) motions to dismiss filed by defendants United States of America (United States), Community Involved Chartered School (CICS), Jefferson County School District R-1 (School District), and Wayne Emmett McKillop (Mr. McKillop). After consideration of the motions, responses, and counsels' argument, I will deny the motions in part and grant them in part.

## I.

## Facts

The following facts are undisputed unless otherwise stated. This case arises out of a forest fire that began on May 18, 1996 in the Pike National Forest near Buffalo Creek in Jefferson County, Colorado. Third Amended Complaint, ¶ 9. The fire destroyed the property, buildings, and dwellings owned and occupied by Plaintiffs Jerry King, Gail King, Curt Rogers, Aimee King-Rogers, David McGuire, and Jennifer McGuire (individual Plaintiffs). Plaintiffs allege that the forest fire started as a result of a

campfire built by defendants Soares, Messer, Martinez, Glandon, and Lacey, *id.* at ¶ 11, students at CICS, a charter school in the School District. Mr. McKillop, a teacher and student advisor at CICS, took sixteen CICS students on a three day camping trip in the Pike National Forest to a site used by he and his wife pursuant to a twenty year "Term Special Use Permit" (Permit) issued by the United States Forest Service. Some of the students stayed in a cabin located on the land while others pitched tents near the cabin and at a site some distance from the cabin. At the more distant campsite, several students built a fire pit for campfires. An ember from one of the campfires apparently started the forest fire.

The following claims are pending:

| Plaintiff | Claim Number | Defendant | Claim |
|---|---|---|---|
| Jerry King, Gail King, Curt Rogers, Aimee King-Rogers, David McGuire, and Jennifer McGuire | One | United States | Negligence |
| | Two | McKillop | Negligence |
| | Three | McKillop | Statutory Liability for violation of §§ 13-21-105 and 18-13-109, C.R.S. |
| | Four | McKillop, Soares, Messer, Martinez, Glandon, and Lacey | Negligent infliction of emotional distress |
| | Five | CICS | *Respondeat superior* for acts and omissions of McKillop |
| | Six | School District | *Respondeat superior* for acts and omissions of CICS and McKillop |
| | Seven | Soares, Messer, Martinez, Glandon, and Lacey | Statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S. |
| | Eight | McKillop, Soares, Messer, Martinez, Glandon, Lacey, CICS, and School District | Strict liability for abnormally dangerous activity |
| | Nine (sic) | (sic) | no claim pleaded |
| | Ten | Jane Roes 1, 2, and 3 | Negligence |

| Plaintiff in intervention | Defendant | Claim number | Claim |
|---|---|---|---|
| Scottsdale | McKillop, Soares, Messer, Martinez, Glandon, Lacey | One | Negligence |
| | McKillop | Two | Negligent supervision |
| | McKillop, Soares, Messer, Martinez, Glandon, Lacey | Three | Ultrahazardous activity |
| | McKillop, Soares, Messer, Martinez, Glandon, Lacey | Four | Statutory liability for violation of § 13-21-105, C.R.S. |
| | McKillop, Soares, Messer, Martinez, Glandon, Lacey | Five | Exemplary damages |
| | McKillop | Six | Third-party liability under Term Special Use Permit |
| **Plaintiff in intervention** | **Defendant** | **Claim number** | **Claim** |
| Colorado Casualty | McKillop, Soares, Messer, Martinez, Glandon, and Lacey | One | Negligence |
| | CICS | Two | *Respondeat superior* for acts and omissions of McKillop |
| | McKillop, Soares, Messer, Martinez, Glandon, and Lacey | Three | Statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S. |
| | School District | Four<br><br>[DISMISSED 4/17/98] | *Respondeat superior* for acts and omissions of McKillop and CICS |
| | McKillop, Soares, Messer, Martinez, Glandon, and Lacey | Five | Exemplary damages |

| Cross-claims of defendant United States of America | Defendant | Claim Number | Claim |
|---|---|---|---|
| | Soares, Messer, Martinez, Glandon, and Lacey | One | Negligence |
| | Soares, Messer, Martinez, Glandon, and Lacey | Two | Liability pursuant to § 13-21-105, C.R.S. |
| | McKillop | Three | Liability under Term Special Use Permit |

The following motions are pending:

| Filing party | Motion | Basis | Responding party |
|---|---|---|---|
| CICS, School District, and McKillop | to dismiss | Fed.R.Civ.P. 12(b)(1) and (6) | all plaintiffs |
| CICS and McKillop | to dismiss | Fed.R.Civ.P. 12(b)(1) and (6) | Colorado Casualty |
| McKillop | to dismiss | Fed.R.Civ.P. 12(b)(1) and (6) | Scottsdale |
| McKillop | to dismiss | Fed.R.Civ.P. 12(b)(1) and (6) | United States |

III.

Pursuant to Fed.R.Civ.P. 12(b)(1), Mr. McKillop, CICS, and the School District move to dismiss for lack of subject matter jurisdiction, all claims brought against them by the individual Plaintiffs and intervening Plaintiffs Scottsdale Insurance Company (Scottsdale) and Colorado Casualty Insurance Company (Colorado Casualty) (collectively, Plaintiffs). These Defendants assert they are immune from Plaintiffs' claims pursuant to the State of Colorado Governmental Immunity Act, § 24,10-101, *et seq.,* C.R.S. (CGIA).

A. Law

1. Rule 12(b)(1)

A motion to dismiss based on sovereign immunity is treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Zerr v. Johnson,* 894 F.Supp. 372, 374 (D.Colo. 1995); *see Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916, 924 (Colo. 1993) (immunity under the CGIA is a jurisdictional issue). Under Rule 12(b)(1), I have wide discretion to consider affidavits, documents, and even hold a limited evidentiary hearing in making appropriate factual findings on jurisdictional issues. *See Wheeler v. Hurdman,* 825 F.2d 257, 259 n. 5 (10th Cir. 1987). In deciding whether sovereign immunity has been waived, I may receive any competent evidence pertaining to the motion, including evidence outside the pleadings, without converting it to a summary judgment motion. *Trinity Broadcasting,* 848 P.2d at 924-25. Further, "[a]ny factual dispute upon which the existence of jurisdiction may turn is for the Court alone,

and not a jury to determine." *Id.* The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). Here, therefore, Plaintiffs have the burden to show that the moving defendants are not immune from suit. *Trinity,* 848 P.2d at 925.

2. CGIA

With respect to actions against public entities, the CGIA provides, in pertinent part:

> **24-10-106. Immunity and partial waiver.** (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . . except as provided otherwise in this section.

§ 24-10-106(1), C.R.S.

The CGIA defines the term "public entity" as follows:

> "Public entity" means the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

§ 24-10-103(5), C.R.S.

B. The School District's Rule 12(b)(1) motion to dismiss claim six for *respondeat superior*

As a CGIA public entity immune from suit for actions which lie in tort or could lie in tort, the School District seeks dismissal of individual Plaintiffs' claim six. The individual Plaintiffs concede that the School District is a "public entity" for purposes of the CGIA. Also, there is no dispute that claim six lies in tort or could lie in tort. Therefore, absent a CGIA immunity exception, the School District is entitled to dismissal of individual Plaintiffs' claim six. *See* Section III. E, *infra.*

C. CICS' Rule 12(b)(1) motion to dismiss individual Plaintiffs' claim five and Colorado Casualty's claim two for *respondeat superior*

Plaintiffs contend that CICS is not a public entity pursuant to the CGIA and, therefore, is not entitled to immunity. Whether a charter school established pursuant to the Charter Schools Act (CSA), § 22-30.5-101, C.R.S., is entitled to immunity pursuant to the CGIA is an issue of first impression in the Colorado courts. Recently, however, in *Academy of Charter Schools v. Adams County School Dist. No. 12,* 1999 WL 304697 (Colo.App. 1999), the Court held that a charter school did not possess either express or implicit authority to sue the School District that granted its charter pursuant to the CSA. *Id.* In deciding this collateral but related issue, the Court stated that "the General Assembly expressed its unambiguous intent that a charter school is a part of the school district that grants its charter." *Id.* For the following reasons, I agree with the *Academy of Charter Schools* court. I hold that charter schools established pursuant to the CSA are public entities and, thus, absent a CGIA immunity exception, entitled to

immunity from liability in claims which lie in tort or could lie in tort.

1. Public entity

There is no dispute that CICS is a charter school established pursuant to the CSA. Plaintiffs contend, however, that CICS is not a public entity as contemplated by the CGIA because: 1) a public school is not necessarily a public entity for sovereign immunity purposes; 2) CICS is not a public entity merely by virtue of its association with the School District; 3) CICS is not a public entity because it operates more like a private school than a public school; and 4) CICS' unique characteristics eliminate the possibility that it is a public entity entitled to sovereign immunity. I disagree.

a. CICS as an "agency, instrumentality, or political subdivision" of the School District

Plaintiffs concede that the School District is clearly a public entity for purposes of the CGIA. According to Plaintiffs, however, CICS is entitled to CGIA immunity only if it can properly be considered an "agency" or "instrumentality" of the School District.

The CGIA provides sovereign immunity not only to school districts but also to every kind of agency, instrumentality, or political subdivision of the school district which is organized pursuant to law. § 24-10-106(1). The terms "agency," "instrumentality," and "political subdivision" are not defined by the CGIA. Under traditional rules of statutory construction, undefined statutory terms are given their plain and ordinary meaning. *Farina v. City*

*and County of Denver,* 940 P.2d 1004, 1006-07 (Colo.App. 1996).

"Agency" is defined as "[t]he relation created by express or implied contract or by law whereby one party delegates the transaction of some lawful business with more or less discretionary power to another. . . . " Black's Law Dictionary, 6th ed. 1990, p. 62. "Instrumentality" is defined as "[s]omething by which an end is achieved; a means, medium, or agency. . . . " *Id.* at 801. "Political subdivision" is defined as "[a] division of the state made by proper authorities thereof, acting within their constitutional powers, for purposes of carrying out a portion of those functions of state which by long usage and inherent necessities of government have always been regarded as public." *Id.* at 1159.

In analyzing whether CICS meets the definition of an agency, instrumentality and/or a political subdivision of the School District, I look to the Charter Schools Act. The CSA was enacted by the Colorado General Assembly "to advance a renewed commitment *by the State of Colorado* to the missions, goals, and diversity of *public education*. . . . " § 22-30.5-102(3) (emphasis added). The legislative declaration states that "[i]t is the obligation of all Coloradans to provide all children with schools that reflect high expectations . . . " *Id.* at 102(1)(a). "Education reform *is in the best interests of the State* in order to strengthen the performance of elementary and secondary *public school pupils*. . . . " *Id.* at 102(1)(b) (emphasis added). In authorizing charter schools, it was the intent of the General Assembly to "create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children *within the public school system.*" *Id.*

at 102(3) (emphasis added). Further, "the General Assem bly [sought] to create an atmosphere in Colorado's *public school system* where research and development in develop ing different learning opportunities is actively pursued." *Id.* (emphasis added).

This language reflects clear delegation by the State o Colorado to CICS, a lawfully created charter school, of the power to conduct the business of educating public schoo pupils. *See Academy of Charter Schools,* 1999 WL 304697 The relationship between CICS and the State, authorized by statute and created by contract, includes delegation o some of the State's public education power to CICS to facilitate "new, innovative and more flexible ways o educating all children within the public school system." § 22.30.5-102(3). Moreover, the CSA grants charter schools discretion to operate quasi-independently from the schoo district, and allows the charter school to contract with the school district to obtain this agency power. *Id.* at 104; *See Academy of Charter Schools,* 1999 WL 304697. Charter schools serve as one means by which the end of education reform sought by the General Assembly is obtained.

Plaintiffs argue that CICS is "too independent and autonomous" to be an agency or instrumentality of the School District. I disagree. Despite some degree of statu tory autonomy, charter schools are "accountable to the school district's local board of education for purposes of insuring compliance with applicable laws and charter provisions and the requirements of Section 15 of Article IX of the State Constitution." § 22-30.5-104(4); *See Academy of Charter Schools,* 1999 WL 304697.

Plaintiffs' argument that CICS cannot operate both as a nonprofit corporation and as a public school is likewise unpersuasive. The CSA provides specifically that:

> [a] charter school may organize as a nonprofit corporation pursuant to the 'Colorado Nonprofit Organization Act," . . . which shall not affect its status as a public school for any purposes under Colorado law.

§ 22-30.5-104(4), C.R.S.; *See also Academy of Charter Schools,* 1999 WL 304697.

2) CICS' association with the School District – public entity or licensee?

Relying on *Davenport v. Community Corrections of the Pikes Peak Region, Inc.,* 942 P.2d 1301 (Colo.App. 1997), *cert. granted, affirmed by* 962 P.2d 963 (Colo. 1998), *cert. denied,* 119 S.Ct. 1462 (1999), Plaintiffs argue that CICS is not a public entity merely by virtue of its association with the School District. Rather, according to Plaintiffs, it is no more than a "licensee" of the School District. I again disagree.

*Davenport* involved the liability of a community corrections facility which admitted it was a nongovernmental agency. The legislative declaration of the Community Corrections statute at issue in *Davenport,* specifically allowed the use of correctional facilities and programs developed by the "department [of corrections], units of local government, and *nongovernmental agencies*. . . . " *Davenport,* 942 P.2d at 1304 citing Colo. Sess. Laws 1987, ch.331, 1 17-27-101 at 1824 (1st Regular Session Supp.) (emphasis added). In contrast, the CSA refers repeatedly to charter schools as public schools operating within the

public school system. *See* § 22.30.5-101.5 *et seq., passim.* Indeed, the CSA forbids the "application to convert a private school . . . into a charter school. . . . " § 22-30.5-106(2) Thus, *Davenport* is distinguishable.

Plaintiffs argue also that CICS, as a charter school, is a mere licensee of the School District. Plaintiffs ignore the plain and ordinary meaning of the term "charter" which is defined as "an instrument in writing from the sovereign power of a state. . . . " Webster's Third New International Dictionary, 1986, p. 378; *accord* Black's Law Dictionary, 6th ed. 1990, p. 235. The CSA is not merely a license to operate the CICS. It is a duly authored and enacted grant of authority from the Colorado General Assembly to Colorado state school districts to create charter schools. Under these circumstances, I cannot conclude that CICS is a licensee of the School District.

3. CICS operational characteristics

Plaintiffs assert that CICS is not entitled to immunity because it operates more like a private school than a public school based on its nonprofit status, its own elected board, its lack of state funding, and the existence of contract and employment agreements between CICS and the School District. I am not persuaded.

a. nonprofit status

As set forth in § 22-30.5-104(4), the CSA allows charter schools to organize as nonprofit corporations without affecting their status as public schools for any purposes under Colorado law. *See Academy of Charter Schools,* 1999 WL 304697. Plaintiffs' claim to the contrary is without merit. *See id.*

b. elected governing board

The CSA allows CICS to be administered and governed by its own elected board. The manner of a charter school's administration and governance, however, must be agreed to by the local board of education. § 22-30.5-104(4). Furthermore, CICS' governing board is "accountable to the school district's local board of education for purposes of insuring compliance with applicable laws and charter provisions and the requirements of Section 15 of Article IX of the State Constitution." *Id.* at 104(2). Rather than operating independently, CICS' governing board is subject to oversight and regulation not only by the School District's board of education, but by the state board of education. *Id.* at 104. Hence, the fact that CICS is allowed to have its own elected governing board does not defeat its status as a public entity.

c. funding

Plaintiffs contend that CICS is not a public entity because it is not fully funded by the School District. It is undisputed, however, that eighty-five percent of CICS' operating expenses is received from the School District. Moreover, CICS receives unreimbursable human resources, business services, payroll services, risk management services, insurance coverage, and legal services from the School District. Def. Reply to Colorado Casualty Resp., Ex. A, p. 8; Schedule 1 and 2; Ex. B. In addition, CICS receives federal and state aid grants. *Id.* at Ex. A, p.7.

The amount of CICS's operating expenses not provided directly by the School District or indirectly from the State of Colorado or state taxpayers is minimal compared to the amount provided directly or indirectly from state

sources. Consequently, the fact that CICS is not fully funded by the School District cannot defeat its status as a public entity.

This conclusion is buttressed by *Graham v. State of Colorado,* 956 P.2d 556 (Colo. 1998). There, the Colorado Supreme Court analyzed the funding level of the University of Northern Colorado (UNC), a state university, in determining whether UNC was entitled to immunity under the "arm of the state" doctrine. Although factually dissimilar, the Court's analysis is sufficiently analogous to aid my decision here.

The *Graham* plaintiffs argued that UNC received tuition income, grants, and gifts from sources other than the State, its main funding source. In rejecting that argument, the Court wrote:

> [t]he mere fact that an entity otherwise funded by general fund dollars receives some cash fund receipts does not convert that entity into something other than a state agency. Most, if not all, state agencies do receive some income from cash receipts; however, they remain subject to the authority and discretion of the General Assembly for budgetary purposes.

*Id.* at 565. Although CICS receives approximately 15% of its budget from some source other than its main funding sources, this does not defeat its status as a public entity.

d. contracts

Plaintiffs claim that CICS is not a public entity because it contracts with the School District and forms employment contracts with its teachers. The CSA allows a charter school to contract for services, prepare its own

budget, and handle its own personnel matters. § 22-30.5-104, C.R.S. Nevertheless, a charter school's authority is subject to a charter application which must be approved by the local board of education consistent with the General Assembly's declared purposes. *See* §§ 22-30.5-106 and 107. Charter schools were authorized to increase parental and community involvement with public schools and to generate "new, innovative and more flexible ways of educating all children within the public school system. . . . " *Id.* at 102(2)(g); 102(3). Consonant with the General Assembly's stated purposes in enacting the CSA, I conclude that CICS' unique characteristics, including its ability to contract for services, prepare its own budget, and handle its own personnel matters, does not render it a private entity.

4. CICS' nonprofit corporate status

Plaintiffs reason that because, pursuant to the Colorado Nonprofit Corporations Act, § 7-22-101(b), C.R.S., CICS enjoys the rights, powers, and privileges of a Colorado nonprofit corporation, it has the power to be sued and, thus, is not immune. I disagree.

It undisputed that CICS is a nonprofit corporation and in Colorado, nonprofit corporations can sue and be sued. Thus, Plaintiffs conclude that CICS has relinquished any immunity it might possess. However, The plain language of § 22-30.5-104(4) provides that a charter school's nonprofit corporate status does not affect its status as a public school for *any* purposes pursuant to Colorado law. *Id.*

Plaintiffs cite authority from other jurisdictions that school districts which consent to be sued lose their immunity. *See e.g. Belcher v. Jefferson County Bd. of Education,*

474 So.2d 1063 (Ala. 1985); *Eastwind Developers, Ltd. v. Board of Education for the City of Valdosta,* 238 Ga. 587, 234 S.E.2d 504 (1977).

In *Eastwind,* a city board of education lost its governmental immunity by express statutory language that the board of education "is . . . authorized and empowered to sue and be sued. . . . " *See* Ga.L. 1931, p. 1024, at p. 1025; *Eastwind,* 234 S.E.2d at 505. The CSA contains no such provision.

In Alabama, state sovereign immunity is provided by the state constitution: "[T]he State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14; *Belcher v. Jefferson County Bd. of Educ.,* 474 So.2d 1063, 1065 (Ala. 1985). Pursuant to statute, however, county boards of education were given the right to sue and contract. *See* Section 16-8-40, Ala. Code 1975. As a result, the boards of education lost immunity as to breach of contract suits. *See Sims v. Etowah County Bd. of Educ.,* 337 So.2d 1310 (Ala. 1976).

Unlike Georgia and Alabama, the CSA contains a provision preserving a charter school's status as a public school despite its corporate status. *See* § 22-30.5-104(4). Moreover, Plaintiffs do not cite and I am unaware of any Colorado authority supporting their position. Under these circumstances, I conclude that CICS' status as a nonprofit corporation does not defeat its status as a public entity.

Accordingly, I hold that under the CSA, a charter school is an agency, instrumentality, and political subdivision of the School District. There being no dispute that the School District is a public entity as contemplated by the CGIA, I hold further that CICS is also a public entity pursuant to the CGIA. Thus, unless an immunity exception exists,

CICS and the School Board are entitled to dismissal of the claims against them.

D. Mr. McKillop's Rule 12(b)(1) motion to dismiss claims based on his status as a public employee

Mr. McKillop moves to dismiss the claims of Plaintiffs and Colorado Casualty on the basis that he is a public employee under the CGIA and, thus, is entitled to immunity. These Plaintiffs argue that Mr. McKillop is not a public employee entitled to immunity under the CGIA because CICS is not a public entity.

Under § 24-10-118(1(2)(a):

> [a] public employee shall be immune from liability in any claim for injury, whether brought pursuant to this article, . . . the common law, or otherwise, which lies in tort or could lie in tort . . . and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton. . . . "

It is undisputed that Mr. McKillop, as a CICS employee, receives his paychecks from the School District, McKillop Depo., p. 270, is a member of the Public Employees' Retirement Association pursuant to § 22-30.5-111(2), and is considered a School District employee. McKillop employment forms, Ex. L, Supplemental Reply Brief.

Having found that CICS is a public entity entitled to sovereign immunity under the CGIA, I conclude that Mr. McKillop is a public employee pursuant to the CGIA and, as a result, is entitled, in the first instance to immunity.

E. Plaintiffs' alternative arguments concerning waiver of immunity

1. "Dangerous condition" exception. § 24-10-106(1)(e), C.R.S.

Plaintiffs contend that even if the School District, CICS, and Mr. McKillop are entitled to CGIA immunity, that immunity has been waived pursuant to § 24-10-106(1)(e), the dangerous condition exception. I find no waiver.

Plaintiffs allege that Mr. McKillop maintained, on behalf of CICS, the cabin and grounds used by CICS as a recreational facility for its students. Third Amended C/O ¶ 34. They allege further that "the cabin and grounds used by McKillop constituted a public facility in a recreation area maintained by CICS," *id.* at ¶ 35, and that "[t]he facility was in a dangerous condition due to the use of campfires therein during periods when campfires constituted an abnormally dangerous activity." *Id.*

Pursuant to § 24-10-106(1)(e), immunity is waived by a public entity in an action for injuries resulting from:

> (e) a dangerous condition of any public . . . facility located in any park or recreation area maintained by a public entity. . . . Nothing in this paragraph (e) . . . shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area. . . .

§ 24-10-106(1)(e), C.R.S. As to Mr. McKillop, § 24-10-118(2) provides that a public employee's sovereign immunity is

waived if one of the exceptions set forth in § 24-10-106(1) applies.

Plaintiffs must prove each element of the exception asserted. *Smith v. Town of Snowmass Village,* 919 P.2d 868, 871 (Colo. App. 1996). Here, then, Plaintiffs must prove:

1. that a dangerous condition existed;

2. that such dangerous condition was of a public facility located in a park or recreation area; and

3. that such public facility was constructed or *maintained by the public entity in question.*

§§ 24-10-103(1) and 106(1)(e) (emphasis added).

"Dangerous condition" is defined as:

> a physical condition of a facility or the use thereof which constitutes an unreasonable risk to the health or safety of the public, which is known to exist and which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility. . . . For the purposes of this subsection . . . , a dangerous condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. A dangerous condition shall not exist solely because the design of any facility is inadequate. The mere existence of wind, water, snow, ice, or temperature shall not, by itself, constitute a dangerous condition.

§ 24-10-103(1), C.R.S.

The language "or the use thereof" contained in the "dangerous condition" definition modifies the term "physical condition" and not the term "facility." *Jenks v. Sullivan,* 826 P.2d 825, 827 (Colo. 1992), *overruled in part on other grounds, Bertrand v. Board of County Comm'rs of Park County,* 872 P.2d 223 (Colo. 1994). Thus, a condition is "dangerous" for purposes of sovereign immunity only if it relates to the physical or structural condition of the facility at issue.

The plain language of the "dangerous condition" definition supports this interpretation. The definition specifically limits the waiver exception to those "physical conditions related to the construction or maintenance of the facility". § 24-10-103(1). In this case, Plaintiffs have not alleged a physical or structural defect of a facility that caused Plaintiffs' injuries.

Plaintiffs' claim of dangerous weather conditions does not change this analysis. The "dangerous condition" definition provides that the existence of wind or temperature shall not, by itself, constitute a dangerous condition. § 24-10-103(1), C.R.S. Moreover, the alleged dangerous condition that caused Plaintiffs' injuries was a condition of unimproved property. Section 24-10-106(1)(e) states that:

> nothing in this paragraph (e) . . . shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by a natural condition of any *unimproved property,* whether or not such property is located in a park or recreation area. . . .

Section 24-10-106(1)(e) (emphasis added). Thus, immunity is waived pursuant to § 24-10-106(1)(e) only where the

dangerous condition alleged is of a physical improvement to the property, such as a building, boat dock, or fence.

Plaintiffs characterize the fire pit constructed by the students at the campsite as the "dangerous condition" of a physical improvement to the property. They argue that the *Jenks* court's interpretation of the CGIA's definition of "dangerous condition" is limited to dangerous conditions stemming from a physical or structural defect in public *buildings. See* Response Brief, pp. 6-8. No Colorado case has addressed facilities which are *not* buildings. *Id.*

In support of their argument, Plaintiffs cite Blacks Law Dictionary's definition of facility as "[s]omething that is built or installed to perform some particular function." Black's Law Dictionary, Fifth Edition, p. 591. This definition is consistent with language in *Longbottom v. State Bd. of Community Colleges and Occupational Educ.,* 872 P.2d 1253, 1254 (Colo.App. 1993) in which the dissent states:

> It is therefore plain that the General Assembly recognized that the word "facility" is a more comprehensive term than the word "building" and that it intended to use the words selectively rather than interchangeably.

*Id.*

Plaintiffs state that they use the term "facility" in the sense of the word "installation," not in the sense of "building." Based on this definition, Plaintiffs argue also that the fire pit built by the students is the "facility" constituting a "dangerous condition." *See* Response Brief, pp. 7-8; Third Amended Complaint, ¶¶ 10, 13-14, 26, 31-32, 36.

Assuming *arguendo,* that Plaintiff's definition of "facility" is correct, under § 24-10-103(1), they still must

prove that the fire pit was constructed or maintained by the public entity. *See* § 24-10-103(1). If their definition is too broad, they must, at a minimum, prove that the cabin used by the students is a public facility maintained by the public entity. Plaintiffs fail under either theory.

Mr. McKillop and his spouse leased the land where the cabin was located for their own private, personal use. The lease was entered into with the United States Forest Service in 1993, before CICS or the CSA was in existence. The mere use of the cabin for a school-sponsored field trip does not transform it into a public facility owned or maintained by CICS or by the School District.

Moreover, the cabin and surrounding property were not maintained by the School District or CICS, as required for application of the "dangerous condition" exception to immunity. The fire began on unimproved property owned and maintained by the United States Forest Service, some distance from the cabin and property leased by Mr. McKillop.

Nor can such use render United States Forest Service land a recreation area maintained by CICS or the School District. CICS and the School District have no control over, and no responsibility for, maintaining United States Forest Service land or Mr. McKillop's cabin.

Rocks placed in a circle by a group of students are not a "facility" as claimed by Plaintiffs. Rocks put on the ground by students do not constitute construction of a facility by the public entity as required by § 24-10-103(1). Furthermore, a circle of rocks is not a *physical improvement* to the property, as required under § 24-10-106(1)(e) (Governmental immunity is not waived for conditions of

"unimproved property."); and *Jenks*. *See Jenks,* 826 P.2d 827.

To the extent that Plaintiffs claim that a "dangerous condition" existed because of wind, they may not prevail. The existence of wind does not create a dangerous condition for purposes of waiving governmental immunity. *See* § 24-10-103(1).

Under these circumstances, I conclude that there was no public facility constructed and maintained by the School District or CICS. Accordingly, the "dangerous condition" exception to immunity does not apply.

2. Liability of CICS and the School District for Mr. McKillop's alleged willful and wanton conduct.

a. waiver of immunity

Plaintiffs allege that CICS and the School District are not entitled to immunity because Mr. McKillop's actions and omissions were willful and wanton. Third Amended C/O ¶¶ 37, 41.

The waiver of governmental immunity for willful and wanton conduct is contained in § 24-10-105 which provides, in pertinent part:

> No public entity shall be liable for [all actions which lie in tort or could lie in tort] . . . except as provided in this article, and no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton. . . .

Section 24-10-105, C.R.S.

The language concerning waiver of immunity for willful and wanton acts or omissions follows the second clause of the statute referring to a public employee's liability. There is no reference to willful and wanton acts or omissions in the first clause of the statute pertaining to public entities. I conclude, therefore, that § 24-10-105 operates as a waiver of a public *employee's* immunity but does not operate as a waiver of a public *entity's* immunity.

A comparison of the language of § 24-10-118(2)(a) and § 24-10-106(1) supports my conclusion. Section 24-10-118, titled **Actions against public employees-requirements and limitations** provides:

> (2)(a). A public employee shall be immune from liability in any claim for injury . . . which lies in tort or could lie in tort . . . unless the act or omission causing such injury was willful and wanton. . . .

Section 24-10-118(2)(a). In contrast, a similar provision pertaining to a public entity's immunity omits the "willful and wanton" language:

> A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . . except as provided otherwise in this section.

Section 24-10-106(1). Without express language imposing responsibility or liability on public entities for their employees' willful or wanton conduct, I conclude that the immunity of CICS and the School District is not waived.

Having concluded that there exists no immunity exception applicable to CICS and the School Board, these entities are entitled to dismissal of: 1) individual Plaintiffs'

claim five and claim six, respectively, for *respondeat superior* and claim eight for strict liability for abnormally dangerous activity; and 2) Colorado Casualty's claim two for *respondeat superior* brought against CICS. *See Stump v. Gates,* 777 F.Supp. 808, 824 (D.Colo. 1991), 986 F.2d 1429 (10th Cir. 1993)

3. Waiver of Mr. McKillop's immunity based on alleged v ilful and wanton actions and omissions

Plaintiffs allege that any immunity Mr. McKillop may possess pursuant to §§ 24-10-105 and 118(2)(a) is waived because his alleged acts and omissions were willful and wanton. Mr. McKillop moves to dismiss pursuant to Fed.R.Civ.P. 12(b)(1). Generally, under Rule 12(b)(1), a trial court may consider affidavits, documents, and even hold a limited evidentiary hearing in making appropriate factual findings on jurisdictional issues without converting the Rule 12 motion to a Rule 56 summary judgment motion. *See Wheeler v. Hurdman,* 825 F.2d 257, 259 n. 5 (10th Cir. 1987). Where, however, the jurisdictional issue is "intertwined with the merits of the case," the Tenth Circuit recognizes an exception to the general rule and permits the district court to treat the motion as one for summary judgment. *Id.* at 259. Plaintiffs' allegations that Mr. McKillop's conduct was "willful and wanton" is a jurisdictional issue as well as an element of their negligence claims. *See* Amended Complaint ¶¶ 29, 32. I therefore employ the Rule 56 standard to view the issue whether Mr. McKillop's actions were willful and wanton. This approach does not prejudice any party because each has submitted and relied on evidence beyond the pleadings.

a. Rule 56 summary judgment standard

The very purpose of a summary judgment motion is to assess whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex,* 477 U.S. at 323; *Mares v. ConAgra Poultry Co., Inc.,* 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.,* 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." *Celotex,* 477 U.S. at 324.

b. Definition of "willful and wanton"

The phrase "willful and wanton" is not defined in the CGIA. However, the majority of Colorado courts to address this issue have applied the following definition contained

in Colorado's exemplary damages statute, § 13-21-102(1)(b), C.R.S. (1994): Willful and wanton conduct is "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to the consequences, or the rights and safety of others, particularly the plaintiff[s]." § 13-21-102(1)(b); *Zerr v. Johnson,* 894 F.Supp. 372, 376 (D.Colo. 1995); *Moody v. Ungerer,* 885 P.2d 200, 205 (Colo. 1994) *citing Pettingell v. Moede,* 129 Colo. 484, 491, 271 P.2d 1038, 1042 (1954).

In a written, sworn statement Mr. McKillop described the following events:

> On Thursday, 5-16-96 I took a group of 16 students for an overnight trip to my cabin on Redskin Creek in Pike National Forest. We arrived at Thursday evening about 7:00 p.m. That night, four students set up a tent about a 1/2 mile from the cabin up two ridges. Another tent was set up close to the cabin. Later that night about 11:00 p.m.-12:00 p.m. I walked up to the tent site and noticed a fire pit the boys had made and they had a fire going. The conditions at the time were windy and very dry. I had the boys put out the fire which they did with water from a gallon jug. The next day which was Friday, the boys came down in the morning and hardly returned to the campsite.
>
> That night, Friday night, the boys returned to the campsite at about 10:00-11:00 p.m. I did not go up to the campsite. Apparently 3-4 of the boys relit the fire and w[ere] feeding the fire until 6:00-8:00 a.m. Saturday morning.

> At about 10:30 a.m. the boys came down from the campsite and later stated that they had doused and put the fire out with water. . . .

Ex. 34A, Attachment 2.

During his deposition, Mr. McKillop testified that he was unaware that the students were going to build a campfire at the tent site up the ridge. McKillop Depo. Vol. 1, pp. 85-86. He denied knowing that the students were taking rocks from near the cabin to build a fire pit. *Id.* Also, according to Mr. McKillop, he did not authorize the boys to build a campfire. *Id.* at 154.

In an interview, Mr. McKillop stated that he visited the campsite on Thursday night about 11:00 p.m. and made the campers extinguish the campfire with water because it was windy. Pltf. Ex. 41 p. numbered as 000114. However, he could "still see some glowing embers." *Id.* Mr. McKillop noted that the students had carried rocks from the cabin to their campsite for use with their fire pit. *Id.* He told the boys to put the rocks [used to build the fire pit] back before leaving on Sunday. *Id.*

On Friday evening, there was a campfire in the fire pit located near his cabin. Mr. McKillop did not know whether there was a fire in the campsite fire pit because he did not visit the campsite. *Id.* He stated he was able to see a lantern at the campsite very late [on Friday evening] but did not see a campfire. Mr. McKillop later learned that the five students had a fire going all night on Friday night. *Id.*

Plaintiffs proffer conflicting evidence concerning these events. According to two students, rather than telling the campers to put out the fire, Mr. McKillop told them to

make it smaller. *See* Messer Depo. p. 86; Glandon Depo. p. 81. Another student testified that the first night at the campsite, Mr. McKillop came up and at first said that he didn't want a fire at all. After a few of the students talked to Mr. McKillop, he then said that [a fire] was fine but it had to be put out before the students went to bed and it had to be small. He said "nothing big, something small." Martinez Depo. p. 30-31. Contrary to Mr. McKillop's accounts, a student testified that Mr. McKillop gave him permission to get rocks from the cabin area to build the fire pit. Glandon Depo. p. 39.

The parties do not dispute that during the four days preceding the fire, daytime humidities were low – between 11 and 12% – and precipitation levels were approximately 30% of normal since January 1996. Importantly, winds as high at 50 miles per hour had been recorded.

Plaintiffs base their claim that Mr. McKillop acted in a willful and wanton manner on allegations that he:

> a. knew that under the highly inflammatory conditions of the Pike National Forest on May 18, 1996, maintaining a campfire was an abnormally dangerous activity, and he knew, or should have known of the existence of an unextinguished campfire caused by children under his supervision, Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon, and Dustin Lacy;
>
> b. permitted the children under his supervision to build a campfire near his cabin in the Pike National Forest;
>
> c. failed to adequately monitor whether his instructions to extinguish the campfire were being observed; [and]

d. failed to monitor whether the campfire had been adequately extinguished.

Third Amended Complaint, ¶ 27.

The pertinent inquiry is the existence of a genuine issue whether Mr. McKillop was willful and wanton in: 1) permitting the campers to build a campfire under the existing wind and weather conditions; 2) failing to monitor whether his instructions to extinguish the campfire were observed by the campers; and 3) failing to monitor whether the campfire had been adequately extinguished. These issues necessarily include determining whether Mr. McKillop was willful and wanton in failing to monitor whether the students built any other fires after Thursday evening.

It is disputed whether Mr. McKillop allowed the students to build and maintain a campfire on Thursday night, May 15, 1996. It is undisputed, however, that Mr. McKillop did not return to the campsite on Friday evening to determine if another campfire had been built. Also, there is no evidence that he told the campers not to build any more campfires after discovering the Thursday night campfire. It is disputed whether Mr. McKillop knew the campers were building a fire pit at the campsite and whether he allowed rocks from the cabin area to be taken to the campsite to be used in its construction. Consequently, Plaintiffs have demonstrated the existence of genuine questions of fact to be tried. *Otteson,* 622 F.2d at 519; Fed.R.Civ.P. 56(e). Based on the documents submitted, and viewing the evidence in a light most favorable to the Plaintiffs, reasonable jurors could find by a preponderance of the evidence that Mr. McKillop's conduct was willful and wanton. *See Anderson v. Liberty Lobby, Inc.,*

477 U.S. 242, 250 (1986). Accordingly, I deny Mr. McKillop's Rule 12(b)(1) motion to dismiss based on lack of subject matter jurisdiction.

F. Mr. McKillop's Rule 12(b)(6) motion to dismiss claim three for statutory liability based on violation of §§ 13-21-105 and 18-13-109, C.R.S.

In the alternative, pursuant to Fed.R.Civ.P. 12(b)(6), Mr. McKillop moves to dismiss claim three brought by the individual Plaintiffs and Colorado Casualty's claim three for statutory liability pursuant to §§ 13-21-105 and 18-13-109 for failure to state a claim upon which relief can be granted. I will grant the motion.

1. Section 18-13-109, C.R.S.

Section 18-13-109, a criminal statute, subjects a person to criminal liability when such person knowingly or with criminal negligence "sets on fire, or causes to be set on fire any woods, prairie, or grounds . . . or who . . . permits a fire, set or caused to be set by him, to pass from his own grounds to the injury of another person . . . ." *Id.*

Section 18-13-109 contains no explicit language allowing a citizen to bring a civil action for its violation. A statute that does not expressly authorize a private right of action may implicitly do so if three factors are present:

> 1. the plaintiff is within the class for whose benefit the statute was enacted;
>
> 2. the legislature intended to create a private remedy; and
>
> 3. an implied private right of action would be consistent with the purpose of the legislative

scheme. *Allstate Ins. Co. v. Palfrey,* 830 P.2d 905 (Colo. 1992).

Beyond question, the individual Plaintiffs are within the class for whose benefit § 18-13-109 was enacted. However, criminal statutes are not intended to be enforced through private legal actions. Colorado Constitution, Art. VI, § 13 established the office of the district attorney and the legislature defined the district attorneys' duties to include enforcement of criminal statutes. *See* § 20-1-101, *et seq.,* C.R.S. Unless otherwise provided by statute, the district attorney is the sole authority charged with enforcement of criminal statutes. *People ex rel. Losavio v. Gentry,* 199 Colo. 153, 606 P.2d 57 (1980).

Plaintiffs contend also that pursuant to § 18-13-109, Mr. McKillop is strictly liable for their damages. Resp. pp. 8-10. Even if there were a basis for private enforcement of this statute, strict liability means "liability without fault." Blacks Law Dictionary, 6th ed. p. 1422 (1986). The statute contains the *mens rea* of knowledge or criminal negligence before liability may be imposed. Thus, an action for strict liability for violation of § 18-31-109 may not lie.

2. Section 13-21-105, C.R.S.

Section 13-21-105 provides "[i]f any person sets fire to any woods or prairie so as to damage any other person, such person shall make satisfaction for the damage . . . ." In contrast to § 18-13-109, this civil statute does not address the culpability required for liability. However, it omits the language "causes to be set on fire" found in the criminal statute. Consequently, § 13-21-105 imposes civil liability only against those persons who actually set the fire. It is undisputed that Mr. McKillop did not build the

campfire that led to the forest fire or set fire to the woods. Therefore, I will dismiss claim three brought by individual Plaintiffs and Colorado Casualty's claim three against Mr. McKillop.

G. Rule 12(b)(6) motion to dismiss claim eight for strict liability – ultrahazardous activity filed by Mr. McKillop, CICS, and the School District

The individual Plaintiffs allege that Mr. McKillop, CICS and the School District are strictly liable to them because the use of campfires under the highly inflammable conditions existing on May 18, 1996, in a forest bordering nearby residential areas, constituted an abnormally dangerous activity. Third Amended C/O ¶ 44. Assuming *arguendo,* that they are not entitled to CGIA immunity, these Defendants move, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss claim eight for failure to state a claim upon which relief can be granted. I will grant the motion.

A Rule 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see Ash Creek Mining Co. v. Lujan,* 969 F.2d 868, 870 (10th Cir. 1992). If the plaintiff has pled facts that would support a legally cognizable claim for relief, a motion to dismiss should be denied. *Conley,* 355 U.S. at 45-46. All well-pleaded factual allegations, as opposed to conclusory allegations, are accepted as true, *see Ash Creek Mining Co.,* 969 F.2d at 870, and viewed in the light most favorable to the nonmoving party. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). All reasonable inferences must be liberally afforded in the plaintiff's favor. *GFF Corp. v.*

*Associated Wholesale Grocers Inc.,* 130 F.3d 1381, 1384 (10th Cir. 1997).

Whether an activity is ultrahazardous and, therefore, subject to strict liability, is a question of law for a court to decide. 3 Restatement (Second) of Torts, § 520, comment 1 (1977); *Clark-Aiken Co. v. Cromwell-Wright Co., Inc.,* 367 Mass. 70, 323 N.E.2d 876 (1975); *Langan v. Valicopters, Inc.,* 88 Wash.2d 855, 567 P.2d 218 (1977).

To determine whether an activity is ultrahazardous, I look to the factors outlined in Restatement (Second) of Torts § 520 (1977):

> 1. existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> 2. likelihood that the harm that results from it will be great;
>
> 3. inability to eliminate the risk by the exercise of reasonable care;
>
> 4. extent to which the activity is not a matter of common usage;
>
> 5. inappropriateness of the activity to the place where it is carried on; and
>
> 6. extent to which its value to the community is outweighed by its dangerous attributes.

3 Restatement (Second) of Torts § 520 (1977).

In Colorado, only explosive blasting and impounding of water have been recognized as ultrahazardous activities subject to strict liability. *Garden of the Gods Village v. Hellman,* 133 Colo. 286, 294 P.2d 597 (1956) (explosives blasting); *Garnet Ditch & Reservoir Co. v. Sampson,* 48 Colo. 285, 110 P. 79 (1910) (water impounding). Colorado

courts have declined to extend strict liability to the disposition of dangerous cleaning compounds, *Forrest v. Imperial Distribution Services, Inc.,* 712 P.2d 488, 491 (Colo.App.), *rev'd on other 'grounds,* 741 P.2d 488 (Colo. 1985), and to natural gas transmission. *Hartford Fire Ins. Co. v. Public Serv. Co. of Colorado,* 676 P.2d 25, 27 (Colo.App. 1983).

Given the weather and wind conditions present, there existed a high degree of risk of harm and it was likely that the resulting harm would be great. However, campfire building is a common activity which, with the exercise of reasonable care, is appropriately carried on in the forest. Moreover, the inherent risks of a campfire can be reduced or eliminated by limiting its size and location, and fully extinguishing it. Therefore, on balance, I conclude as a matter of law that campfire building in a forest is not an ultrahazardous activity and will grant Defendants' Rule 12(b)(6) motion to dismiss claim eight brought by the individual Plaintiffs.

H. Mr. McKillop's Rule 12(b)(1) and (6) motions to dismiss Scottsdale's claims and cross-claim three brought by the United States

1. Scottsdale's claims

Mr. McKillop asserts that he is entitled to Rule 12(b)(1) dismissal of Scottsdale's claims one through six based on its failure to file the requisite notice of claim pursuant to CGIA § 24-10-109. I agree.

Before bringing any action against a public employee which lies in tort or could lie in tort, a claimant is required to file a notice of claim. § 24-10-109. Compliance with the notice requirement:

> *shall* be a jurisdictional prerequisite to any such action against a public employee, *and shall be required* whether or not the injury sustained is alleged in the complaint to have occurred as a result of the willful and wanton act of such employee, and *failure of compliance shall forever bar any such action against a public employee.*

§ 24-10-118(1)(a) (emphasis added). It is undisputed that no notice of claim was filed by Scottsdale.

In response, Scottsdale states that it did not allege "that McKillop was a public employee in the course and scope of his employment which would entitle him to governmental immunity . . . ." Resp. p. 9. Rather, Scottsdale contends governmental immunity does not apply based on the testimony of Mr. McKillop's supervisor, Pauline McBeth, that many of his actions were not approved by her and were not authorized by the school. McBeth Deposition, *passim.*

As a public employee, subject to the disputed willful/wanton exception, Mr. McKillop is entitled to CGIA immunity. Merely because Scottsdale did not allege Mr. McKillop was a public employee does not take him outside the protection of the CGIA. To conclude otherwise would render governmental immunity meaningless and thwart the statutory purpose of protecting taxpayers from excessive fiscal burdens associated with such tort litigation. *See* § 24-10-102. The structure of the CGIA allows waiver of a public employee's immunity if he is not acting within the scope of his employment or if his actions are willful and wanton. However, deciding whether a public employee has waived his governmental immunity, including whether a public employee is acting within the scope of his employment, occurs only after proper notice is filed. Therefore,

having failed to file a notice of claim, all of Scottsdale's claims which lie in tort or could lie in tort are barred.

Scottsdale argues that claim six for third-party liability under the Term Special Use Permit (Permit) sounds in contract rather than tort and, therefore, is not subject to the CGIA notice requirements.

The CGIA provides that where the claim alleged could sound in tort, such claim is barred by the CGIA, regardless whether the claimant frames it as a tort claim. § 24-10-109. Therefore, I look to the substance of claim six to determine whether it could lie in tort. *See Morrison v. City of Aurora,* 745 P.2d 1042, 1045 (Colo.App. 1987).

The allegations supporting claim six for third party liability under the Permit state that the Permit provides that "[t]he holder shall be liable for any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and cost of fire suppression." Further, Scottsdale alleges that Mr. McKillop is liable for the damages sustained by its subrogee Linda Farris. The substance of the claim is that Mr. McKillop breached a duty of care. Thus, Scottsdale's third party beneficiary claim is a claim which could lie in tort. In addition, claims for damages resulting from the destruction of property could lie in tort. Therefore, claim six is subject to the CGIA notice requirements.

In the alternative, Mr. McKillop argues that Scottsdale's insured, Linda Farris, was not an intended beneficiary of the Permit. A nonparty to a contract is not entitled to a right of action on that contract unless the parties to it intended to benefit the nonparty. *Fourth & Main Co. v. Joslin Dry Goods Co.,* 648 P.2d 178 (Colo.App. 1982). Such

intent must be apparent from the terms of the agreement and surrounding circumstances.

Parties to the Permit are Mr. McKillop, his spouse, and the United States Forest Service. Ex. E. The purpose of the Permit was to lease U.S. Forest Service land to Mr. McKillop for recreational use. *Id.* Moreover, the Permit provides that "the holder shall exercise diligence in preventing damage to the land and property of the *United States*". *Id.* at p. 3 (emphasis added). The Permit states further that the holder "shall protect the scenic and aesthetic value of the *National Forest System lands* . . . ." *Id.* (emphasis added). Also, "[t]he holder shall fully repair and bear the expense for all damage, other than ordinary wear and tear *to National Forest lands, roads, and trails* . . . ." *Id.* (emphasis added). And the "holder shall be liable for any damage suffered *by the United States* . . . ." *Id.* at p. 4 (emphasis added). It is clear from the provisions of the Permit that no benefit to Scottsdale or its insured was intended. The Permit was an agreement solely for the benefit of the United States Forest Service, Mr. McKillop, and his spouse. Thus, the third party beneficiary claim fails as a matter of law. See *Fourth & Main Co.*, 648 P.2d at 182 (Where permit language contains no indication that it was intended to benefit any person or group of persons other than contracting parties, there is no third-party beneficiary claim).

I will, therefore, grant Mr. McKillop's Rule 12(b)(1) motion to dismiss Scottsdale's claims one through six for failure to provide notice pursuant to the CGIA. In the alternative, he is entitled to Rule 12(b)(6) dismissal of claim six on the grounds that Scottsdale's insured, Linda Farris, is not an intended beneficiary of the Permit.

2. Mr. McKillop's Rule 12(b)(1) and (6) motions to dismiss the United States' cross-claim three

In its third cross-claim, the United States seeks to hold Mr. McKillop liable pursuant to the terms of the Permit for damages it suffered as a result of the Buffalo Creek fire. Cross-claim Three. ¶ 14. Mr. McKillop asserts he is immune from liability on this claim or, in the alternative, that the United States did not file a notice of claim within 180 days of the fire as required by §§ 24-10-109 and 24-10-118(2)(a). In addition, Mr. McKillop seeks dismissal of cross-claim three pursuant to Rule 12(b)(6) on the basis that the activities leading to the forest fire did not occur on property covered by the Permit. For the following reasons, I deny Mr. McKillop's Rule 12(b)(6) motion but grant his Rule 12(b)(1) motion.

The United States does not dispute that this claim sounds in tort for purposes of governmental immunity. Nevertheless, the United States claims that governmental immunity is not applicable because the several states waived their right to sovereign immunity. Also, the United States does not dispute that it failed to file a notice of claim pursuant to the CGIA. The United States contends that the CGIA's notice requirement is not applicable because, pursuant to the Supremacy Clause of the United States Constitution, a state may not impose notice requirements or shorten applicable federal statutes of limitations. For the following reasons, I will dismiss the United States' cross-claim three against Mr. McKillop.

a. Sovereign immunity

States have waived sovereign immunity to the federal government and the federal government may, consequently,

sue any state without consent. *See United States v. State of California,* 328 F.2d 729, 731 (9th Cir.), *cert. denied,* 379 U.S. 817 (1964). Sovereign immunity is, however, a distinct legal concept from governmental immunity. *Shootman v. Department of Transportation,* 926 P.2d 1200, 1203, n. 2 (Colo. 1996). "Sovereign immunity generally refers to the immunity of the state or federal government, whereas "governmental immunity" refers to the immunity of all levels of government." *Id.* As *Shootman* recognized, the states relinquished a portion of their implicit sovereign immunity to the federal government, but governmental immunity remains applicable to other divisions of government, including school districts. *See id.*

Therefore, where, as here, a public employee is sued rather than the state, the pertinent doctrine is governmental immunity pursuant to, in this case, the CGIA.

b. Notice requirements

The United States suggests that the proper analysis calls for the application of the three-year limitations period prescribed in 28 U.S.C. § 2415 for suits by the U.S. involving money damages based on tort. It relies on a number of advantages over private litigants enjoyed by the United States because of its unique status as sovereign, specifically that it may not be subject to state statutes of limitations. *See* Resp. Brief pp. 2-3. Under the United States' rationale therefore, the 180-day notice requirement provided by the CGIA regarding tort claims is inapplicable. Where, as here, the Permit was issued under federal law, pursuant to the Supremacy Clause, federal law controls. Consequently, under the United States' reasoning, Colorado is precluded from shortening the statute of

limitations or requiring notice within 180 days after the date of the discovery of the injury. *See* § 24-10-109. I disagree.

At first blush, several decisions seemingly lend support to this argument. *See e.g., Felder v. Casey,* 487 U.S. 131, 144-46 (1988); *United States v. John Hancock Mutual Life Ins. Co.,* 364 U.S. 301, 305-306 (1960); *United States v. St. John's General Hosp.,* 875 F.2d 1064, 1067 (3d Cir. 1989); *United States v. Independent School Dist. No. 1 of Okmulgee County, Okla.,* 209 F.2d 578, 580-81 (10th Cir. 1954); *O'Donnell v. United States,* 428 F.Supp. 629, 634 (W.D.La. 1977).

However, these cases all involve situations where the United States is enforcing its rights as sovereign pursuant to a specific federal statute. *See e.g., Felder,* 487 U.S. at 144-46 (§ 1983 claim); *John Hancock,* 364 U.S. at 305-306 (property redemption pursuant to 28 USC § 2410(c)); *St. John's General Hosp.,* 875 F.2d at 1067 (Hill-Burton Act, 42 USC § 291); *Independent School Dist. No. 1,* 209 F.2d 580-81 (federal law controls in connection with payment of federal funds); *O'Donnell,* 428 F.Supp. at 634. *See also, Glenn Elec. Co., Inc. v. Donovan,* 755 F.2d 1028 (3d Cir. 1985) (United States Housing Act, 42 U.S.C. SS 1437-1437j).

In this case, the United States' claim that it is entitled to damages arising out of the negligence of Mr. McKillop is a matter of substantive state law. Where, as here, both the Plaintiffs' and Defendant/cross-plaintiff United States' claims require the application of substantive state law, whether the United States is subject to a federal or state statute of limitations is an open question. *See United States v. California,* 507 U.S. 746, 757 (1993). There, the

Supreme Court expressly declined to resolve whether, in general, a state law action brought by the United States is subject to a federal or state statute of limitations. *Id.* The Court characterized the issue as "a difficult question." *Id.*

Absent guidance from the Tenth Circuit or the United States Supreme Court, I am persuaded by the reasoning contained in the following cases that when the United States brings a state law claim, the Supremacy Clause does not apply.

Historically, the Supremacy Clause as well as other public policies protecting the federal fisc have justified the United States' "continued enjoyment of significant litigation advantages over other parties seeking to enforce their rights, such as freedom from state statutes of limitations." *Santiago v. United States,* 884 F.Supp. 45, 50 (D.P.R. 1995). But "when a claim procedure is a condition precedent to, or an integral element of a state-created cause of action, the United States is not exempt from the time bar, even if a federal statute of limitations may otherwise apply." *United States v. State of California,* 932 F.2d 1346, 1351 (9th Cir. 1991), *aff'd sub nom., United States v. California,* 507 U.S. 746 (1993).

The United States' cross-claim against Mr. McKillop is properly construed as a state tort claim alleging damages as a result of McKillop's alleged negligence. The United States does not dispute that its claim lies in tort or could lie in tort. Furthermore, the United States has set forth no claim under federal law.

"Compliance with the notice provisions of the Governmental Immunity Act is a condition precedent to the commencement *of a state action* against a public entity." *Chacon v. Zahorka,* 663 F.Supp. 90, 93 (D.Colo. 1987)

(citation omitted) (emphasis added). Where the claim is based on state law, state substantive law applies and the Supremacy Clause does not control. *Id.; Miami Inter. Realty Co. v. Town of Mt. Crested Butte,* 579 F.Supp. 68, 77 (D.Colo. 1984) (notice of claim provision of Colorado's Governmental Immunity Act would apply in a case based on diversity and not a federal question); *Orthmann v. Apple River Campground, Inc.,* 757 F.2d 909, 911 (7th Cir. 1985) (where case is in federal court based on diversity and not a federal question, state substantive law, including a state notice of claim provision, applies); *See also Ruh v. Samerjan,* 32 F.3d 570 (7th Cir. 1994) (state notice of claim provision applies to plaintiff's state, but not federal, claim); *Brissett v. Paul,* 141 F.3d 1157, 1998 WL 195945 (4th Cir. 1998) (state notice of claim requirement in governmental tort claims act applicable to plaintiff's state law claims); *Swanson v. Faulkner,* 55 F.3d 956, 965 (4th Cir. 1995) (notice of claim provision applicable to claim for state administrative relief).

It is only where a plaintiff has stated a federal claim that a notice of claim provision may be struck down based on supremacy because allowing a federal claim to be limited by state law would defeat the objective of the federal law. *Felder,* 487 U.S. at 133; *Miami Intern. Realty Co.,* 579 F.Supp. at 77 ("[T]o require notice of claim as a condition precedent of [a federal] suit 'would also unduly interfere with the federal action.'") (citation omitted).

It is undisputed here that the United States' claim against Mr. McKillop is based solely upon state law. The mere issuance of Mr. McKillop's Special Use Permit does not convert this claim to one under federal law. Accordingly, state substantive law controls. The United States

was required to comply with the CGIA notice requirements. *See* § 24-10-109 and 24-10-118(1)(a).

The United States' assertion that the notice of claim provision shortened the statute of limitations applicable to the United States is similarly without merit. The notice of claim provisions set forth in §§ 24-10-109 and 118 are not limitations on actions, but conditions precedent to the assertion of a claim against a public entity or public employee. *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 763 (Colo. 1992). Failure to file a notice of claim is a jurisdictional bar to the action. § 24-10-109 and 118(1)(a). Indeed, § 24-10-109(5) sets forth the explicit requirement that claimants against public entities and public employees must also comply with applicable statutes of limitations.

I conclude, therefore, that the United States was required to file a notice of claim pursuant to the CGIA. Having failed to do so, its third cross-claim against Mr. McKillop is jurisdictionally barred and must be dismissed for lack of subject matter jurisdiction. *See* Fed.R.Civ.P. 12(b)(1).

3. Mr. McKillop's Rule 12(b)(6) motion

I disagree with Mr. McKillop's argument that even if the United States were not required to comply with the CGIA's Notice of Claim provision, the United States' damages did not arise from the use of the subject property. There is no dispute that the Buffalo Creek forest fire had its origin in a campfire built off the property subject to the Permit. However, the Permit does not require that the cause of the damage originate on the property. Rather, the Permit states that Mr. McKillop "shall be liable for any

damage suffered by the United States *resulting from or related to* use of this permit . . . ." Ex. 44. (emphasis added). Mr. McKillop used the property covered by the Permit for the school camping trip. During the camping trip, the forest fire was started as a result of a campfire built by the students on the camping trip. Under these circumstances, I conclude that the damages claimed by the United States resulted from and were related to the Permit. Consequently, I deny Mr. McKillop's Rule 12(b)(6) motion.

## Conclusion

Based on the reasoning set forth in this Memorandum Opinion and Order, listed below is the disposition of the following claims:

| Plaintiff | Claim Number | Defendant | Claim Disposition |
|---|---|---|---|
| Jerry King, Gail King, Curt Rogers, Aimee King-Rogers, David McGuire, and Jennifer McGuire | One | United States | Negligence<br><br>**NO MOTIONS FILED CLAIM PENDING** |
| | Two | McKillop | Negligence<br><br>**MOTIONS TO DISMISS DENIED**<br><br>**CLAIM PENDING** |
| | Three | McKillop | Statutory Liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.<br><br>**RULE 12(B)(6) MOTION GRANTED**<br><br>**CLAIM DISMISSED** |
| | Four | McKillop,<br><br>Soares, Messer, Martinez, Glandon, and Lacy | Negligent infliction of emotional distress-<br><br>**MCKILLOP'S MOTION TO DISMISS DENIED**<br><br>**CLAIM PENDING AGAINST ALL DEFENDANTS** |
| | Five | CICS | Respondeat superior for acts and omissions of McKillop<br><br>**RULE 12(B)(1) MOTION GRANTED**<br><br>**CLAIM DISMISSED** |

| | | | |
|---|---|---|---|
| | Six | School District | Respondeat superior for acts and omissions of CICS and McKillop -<br><br>**RULE 12(B)(1) MOTION GRANTED - CLAIM DISMISSED** |
| | Seven | Soares, Messer, Martinez, Glandon, and Lacy | Statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.<br><br>**NO MOTIONS FILED- CLAIM PENDING** |
| | Eight | McKillop, CICS, and School District | Strict liability for abnormally dangerous activity |

| | | | |
|---|---|---|---|
| | | | activity<br><br>**DEFENDANTS' CICS, AND SCHOOL DISTRICT RULE 12(b)(1) MOTIONS TO DISMISS GRANTED**<br><br>**DEFENDANT MCKILLOP'S RULE 12(b)(1) MOTIONS TO DISMISS DENIED; RULE 12(b)(6) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST MCKILLOP, CICS, AND SCHOOL DISTRICT** |
| | | Soares, Messer, Martinez, Glandon, Lacey, | **CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | Nine (sic) | (sic) | no claim pleaded |
| | Ten | Jane Roes 1, 2, and 3 | Negligence |

| Plaintiff in intervention | Claim Number | Defendant | Claim-Disposition |
|---|---|---|---|
| Scottsdale | McKillop | One | Negligence<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST MCKILLOP**<br><br>**CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | Soares, Messer, Martinez, Glandon, Lacey | | |
| | McKillop | Two | Negligent supervision -<br><br>**RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED** |
| | McKillop | Three | Ultrahazardous activity<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST McKILLOP**<br><br>**CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | Soares, Messer, Martinez, Glandon, Lacey | | |

| | | | |
|---|---|---|---|
| | McKillop<br><br>Soares, Messer, Martinez, Glandon, Lacey | Four | Statutory liability for violation of §13-21-105, C.R.S.<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**IN THE ALTERNATIVE, MCKILLOP'S RULE 12(B)(6) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST MCKILLOP**<br><br>**CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | McKillop<br><br>Soares, Messer, Martinez, Glandon, Lacey | Five | Exemplary damages -<br><br>**MCKILLOP'S RULE 12(B)(6) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST MCKILLOP**<br><br>**CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | McKillop | Six | Third-party liability under Term Special Use Permit<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS GRANTED** |

| Plaintiff in intervention | Defendant | Claim number | Claim |
|---|---|---|---|
| Colorado Casualty | McKillop<br><br>Soares, Messer, Martinez, Glandon, and Lacey | One | Negligence<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS DENIED**<br><br>**CLAIM PENDING AGAINST ALL DEFENDANTS** |
| | CICS | Two | Respondeat superior for acts and omissions of McKillop<br><br>**CICS' RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED** |
| | McKillop<br><br>Soares, Messer, Martinez, Glandon, and Lacey | Three | Statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.-<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED AGAINST MCKILLOP**<br><br>**CLAIM PENDING AGAINST REMAINING DEFENDANTS** |
| | School District | Four | *Respondeat superior* for acts and omissions of McKillop and CICS<br><br>**CLAIM DISMISSED PURSUANT TO STIPULATION-4/17/98** |

| | | | |
|---|---|---|---|
| | McKillop<br><br>Soares, Messer, Martinez, Glandon, and Lacey | Five | Exemplary damages - Negligence<br><br>**MCKILLOP'S RULE 12(B)(1) MOTION TO DISMISS DENIED**<br><br>**CLAIM PENDING AGAINST ALL DEFENDANTS** |
| **Cross-claims of defendant United States of America** | **Defendant** | **Claim Number** | **Claim** |
| | Soares, Messer, Martinez, Glandon, and Lacey | One | Negligence<br><br>**NO MOTIONS FILED CLAIM PENDING** |
| | Soares, Messer, Martinez, Glandon, and Lacey | Two | Liability pursuant to § 13-21-105, C.R.S.<br><br>**NO MOTIONS FILED CLAIM PENDING** |
| | McKillop | Three | Liability under Term Special Use Permit -<br><br>**MCKILLOP'S RULE 12(B)1) MOTION TO DISMISS GRANTED**<br><br>**CLAIM DISMISSED**<br><br>**IN THE ALTERNATIVE, MCKILLOP'S RULE 12(B)(6) MOTION TO DISMISS IS DENIED** |

Accordingly, IT IS ORDERED that:

1. Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is DENIED as to individual Plaintiffs' a) claim two for negligence; b) claim three for statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.; c) claim four for negligent infliction of emotional distress; and d) claim eight for strict liability for abnormally dangerous activity;

2. Defendant Wayne Emmett McKillop's Rule 12(b)(6) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim three for statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.; and b) claim eight for strict liability for abnormally dangerous activity;

3. Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is DENIED as to the following claims of Colorado Casualty Insurance Company: a) claim one for negligence; and b) claim five for exemplary damages;

4. Defendant Wayne Emmett McKillop's Rule 12(b)(6) motion to dismiss is GRANTED as to Colorado Casualty Insurance Company's claim three for statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.;

5. Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is GRANTED as to Scottsdale Insurance Company's claims one through six;

6. Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is GRANTED as to defendant United States of America's cross-claim three for liability under Term Special Use Permit. Mr. McKillop's Rule 12(b)(6) motion to

dismiss is DENIED as to defendant United States of America's cross-claim three for liability under Term Special Use Permit;

7. Defendant Community Involved Chartered School's Rule 12(b)(1) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim five for *respondeat superior* for acts and omissions of Mr. McKillop; and b) claim eight for strict liability for abnormally dangerous activity;

8. Defendant Community Involved Chartered School's Rule 12(b)(1) motion to dismiss Colorado Casualty Insurance Company's claim two for *respondeat superior* for acts and omissions of Mr. McKillop is GRANTED;

9. Defendant Jefferson County School District R-1's Rule 12(b)(1) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim six for *respondeat superior* for acts and omissions of Mr. McKillop; and b) claim eight for strict liability for abnormally dangerous activity; and

10. a status and scheduling hearing is set for June 17, 1999 at 3:30 p.m. in Courtroom C-502, 1929 Stout Street, Denver, Colorado.

Dated: ~~June~~ May 28, 1999 in Denver, Colorado.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**CERTIFICATE OF SERVICE**

Civil Case No. 97-B-341

The undersigned certifies that a copy of the foregoing Memorandum Opinion was served on May 28, 1999, by:

(X) delivery to:

William Pharo
Assistant U.S. Attorney

Magistrate Judge Donald E. Abram

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

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#417
Englewood, CO 80111

/s/ Deb Jansen
Deputy Clerk

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Lewis T. Babcock

Civil Action No. 97-B-341

JERRY KING, GAIL KING, CURT ROGERS, AIMEE KING-ROGERS, DAVID McGUIRE and JENNIFER McGUIRE,

Plaintiffs,

v.

WAYNE EMMETT McKILLOP,

Defendant.

---

JUDGMENT
(Filed Sep. 29, 2000)

---

PURSUANT TO and in accordance with the Memorandum Opinion and Order entered May 28, 1999 by the Honorable Lewis T. Babcock, United States District Chief Judge, it is

ORDERED that Defendant Wayne Emmett McKillop's Rule 12(b)(6) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim three for statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S.; and b) claim eight for strict liability for abnormally dangerous activity. It is

FURTHER ORDERED that Defendant Wayne Emmett McKillop's Rule 12(b)(6) motion to dismiss is GRANTED as to Colorado Casualty Insurance Company's claim three for statutory liability for violation of §§ 13-21-105 and 18-13-109, C.R.S. It is

FURTHER ORDERED that Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is GRANTED as to Scottsdale Insurance Company's claims one through six. It is

FURTHER ORDERED that Defendant Wayne Emmett McKillop's Rule 12(b)(1) motion to dismiss is GRANTED as to defendant United States of America's cross-claim three for liability under Term Special Use Permit. It is

FURTHER ORDERED that Defendant Community Involved Chartered School's Rule 12(b)(1) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim five for *respondeat superior* for acts and omissions of Mr. McKillop; and b) claim eight for strict liability for abnormally dangerous activity. It is

FURTHER ORDERED that Defendant Community Involved Chartered School's Rule 12(b)(1) motion to dismiss Colorado Casualty Insurance Company's claim two for *respondeat superior* for acts and omissions of Mr. McKillop is GRANTED. It is

FURTHER ORDERED that Defendant Jefferson County School District R-1's Rule 12(b)(1) motion to dismiss is GRANTED as to individual Plaintiffs': a) claim six for *respondeat superior* for acts and omissions of Mr. McKillop; and b) claim eight for strict liability for abnormally dangerous activity.

PURSUANT TO and in accordance with the Order entered December 16, 1999 by the Honorable Lewis T. Babcock, United States District Chief Judge, it is

FURTHER ORDERED that the claims of the plaintiffs, plaintiffs in intervention and the United States of

America against Nathan Soares, Loney Martinez, Eli Messer, Troy Glandon and Dustin Lacey are hereby dismissed with prejudice; each party shall pay its own costs.

PURSUANT TO and in accordance with the Order of Dismissal entered December 16, 1999 by the Honorable Lewis T. Babcock, United States District Chief Judge, it is

FURTHER ORDERED that the plaintiff's claims against the Untied States of America are dismissed with prejudice.

PURSUANT TO and in accordance with the Order of Dismissal with Prejudice entered September 26, 2000 by the Honorable Lewis T. Babcock, United States District Chief Judge, it is

FURTHER ORDERED that the within action and all allegations in the plaintiffs' complaint against the defendants The Jefferson County School District R-1, Community involved Charter School, and Wayne Emmett McKillop are hereby dismissed with prejudice. It is

FURTHER ORDERED that action and complaint are dismissed; each party shall pay its own costs and fees.

DATED at Denver, Colorado this 29th day of September, 2000.

EOD
UNITED STATES
DISTRICT COURT
DENVER, COLORADO
SEP 29, 2000
JAMES R. MANSPEAKER
CLERK

FOR THE COURT:
JAMES R. MANSPEAKER,
CLERK
By /s/ Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**CERTIFICATE OF SERVICE**

Civil Case No. 97-B-341

The undersigned certifies that a copy of the foregoing Judgment was served on Sept. 29, 2000, by:

(X) delivery to:

Magistrate Judge Boyd N. Boland

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

Eugene Deikman, Esq.
Eugene Deikman, P.C.
1700 Broadway, Suite 1200
Denver, CO 80290

William J. Kowalski, Esq.
Colleen A. O'Laughlin, Esq.
Caplan and Earnest, LLC
2595 Canyon Blvd., Suite 400
Boulder, CO 80302

/s/ Deb Jansen
Deputy Clerk

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

JERRY KING; GAIL KING; CURT ROGERS; AIMEE KING-ROGERS; DAVID MCGUIRE; JENNIFER MCGUIRE.

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant-Cross-Claimant-Appellant.

and

WAYNE EMMETT MCKILLIP [sic],

Defendant-Cross-Defendant-Appellee.

No. 00-1486

---

ORDER

Filed November 8, 2002

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Before **KELLY** and **HOLLOWAY**, Circuit Judges, and **SHADUR**, District Judge.*

---

* The Honorable Milton I. Shadur, United States District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-B-341

JERRY KING, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

---

**UNITED STATES' AMENDED ANSWER TO THIRD AMENDED COMPLAINT AND CROSS-CLAIMS AGAINST CO-DEFENDANTS MCKILLOP, SOARES, MESSER, MARTINEZ, GLANDON AND LACEY**

---

**ANSWER**

The United States of America, by undersigned counsel, answers the Third Amended Complaint in correspondingly numbered paragraphs as follows:

1. Admit.

2. Admit.

3. This paragraph alleges conclusions of law to which no answer is required. To the extent an answer is required, the Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 3.

4. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 4.

5. Admit.

6. Lack sufficient information to admit or deny.

7. Lack sufficient information to admit or deny.

8. Admit.

9. The Defendant admits that on May 18, 1996, a forest fire originating in the Pike National Forest near Buffalo Creek destroyed private property. The Defendant lacks sufficient information to form a belief as to the truth of the remaining allegations in paragraph 9.

10. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 10.

11. Admit that the forest fire was caused by embers from a campfire that was not fully extinguished, and that the campfire was built by the named students of CICS, who were being supervised by a CICS teacher, Mr. McKillop. Admit that the students had pitched a tent and built a campfire near McKillop's cabin in Pike National Forest as alleged in the second sentence. The Defendant lacks sufficient information to form a belief as to the distance between McKillop's cabin and the campfire.

12. Deny first sentence. Admit that daytime humidities during the four days preceding the fire were 11-12% as alleged in the fourth sentence. The Defendant lacks sufficient information to form a belief as to the remaining allegations in paragraph 12.

13. Deny.

14. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 14.

15. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 15.

16. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 16.

17. Admit that Wayne E. and Jeanette L. McKillop were personally issued a Term Special Use Permit by the Forest Service on February 7, 1993 for a fee of $512.00 per year. This permit authorized only personal recreational use of a noncommercial nature by the McKillops, members of their immediate family and guests. The Defendant lacks sufficient information to form a belief as to the truth of the remaining allegations in paragraph 17.

18. The United States denies that any of its employees were negligent or committed any tort. The United States denies that any acts or omissions of its employees proximately caused any of the Plaintiffs' claimed damages. The United States denies that it is responsible for the conduct of the other named and unnamed co-defendants. The United States lacks sufficient information to determine the extent of Plaintiffs' damages. The United States avers that to the extent Plaintiffs were damaged, the damages were caused by the acts and omissions of co-defendants, and Plaintiffs' own comparative negligence.

19. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 19.

20. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 20.

21. The above answers are incorporated herein and made a part of the following answers.

22. Deny.

23. Deny.

24. Deny.

25. Deny.

26. Deny.

27. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 27.

28. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 28.

29. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 29.

30. This paragraph asserts conclusions of law to which no answer is required. To the extent an answer is required, the Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 30.

31. This paragraph asserts conclusions of law to which no answer is required. To the extent an answer is required, the Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 31.

32. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 32.

33. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 33.

34. Deny. Aver that Wayne E and Jeanette L. McKillops were personally issued a Term Special Use Permit by the Forest Service on February 7, 1993. This permit authorized only personal recreational use of a noncommercial nature by the McKillops, members of their immediate family and guests.

35. Deny first sentence. The Defendant lacks sufficient information to form a belief as to the truth of the remaining allegations in paragraph 35.

36. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 36.

37. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 37.

38. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 38.

39. The above answers are incorporated herein.

40. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 40.

41. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 41.

42. The Defendant admits that the named individuals started a campfire and failed to fully extinguish it, and that wind caused embers to spread from the campfire site causing a forest fire. The Defendant lacks sufficient information to form a belief as to the truth of the remaining allegations in paragraph 42.

43. This paragraph asserts a legal conclusion to which no answer is required. To the extent an answer is required, the Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 43.

44. The answers in response to the Sixth and Seventh Claims for Relief are incorporated herein. The remainder of this paragraph asserts a legal conclusion to which no answer is required. To the extent an answer is required, the Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 44.

45. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 45.

46. The Defendant lacks sufficient information to form a belief as to the truth of the allegations in paragraph 46.

47. The Defendant denies any and all allegations not specifically admitted above.

The Defendant denies that the Plaintiffs are entitled to any relief from the United States of America.

## AFFIRMATIVE DEFENSES

1. The Court lacks jurisdiction.

2. Discretionary function exception to the Federal Tort Claims Act. 28 U.S.C. § 2680(a).

3. Comparative negligence.

4. Assumption of risk.

5. The Plaintiffs' claimed damages were not proximately caused by the acts or omissions of employees of the United States.

6. The Plaintiff's [sic] claimed damages were proximately caused by the acts or omissions of the co-defendants.

7. Lack of duty.

8. Act of God.

9. Plaintiffs' claims for non-economic damages are limited by Colorado law.

10. Failure to mitigate damages.

11. The United States is immune from Plaintiffs, claims.

## CROSS-CLAIMS

### GENERAL ALLEGATIONS

1. The United States claims that cross-claim defendants Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon, Dustin Lacey and Wayne Emmett McKillop are liable to the United States for damages incurred as a result of a forest fire in the Pike National Forest which began on May 18, 1996.

2. The Court has jurisdiction pursuant to 28 U.S.C. § 1345.

3. Venue lies in the District of Colorado pursuant to 28 U.S.C. § 1391(b).

4. The Pike National Forest is forested land located in Colorado that is owned by the United States of America, and managed by the U.S. Department of Agriculture, Forest Service ("Forest Service").

5. On February 7, 1993, Wayne E. and Jeanette L. McKillop were issued a Term Special Use permit by the Forest Service for .98 acres of land, including a cabin located in the Pike National Forest. The fee for this permit was $512.00 per year. The permit authorizes personal recreational use of a noncommercial nature by the McKillops, members of their immediate family and guests. The permit provides that, "The holder shall be liable for any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression." The permit was in effect in 1996.

6. In May of 1996, Wayne Emmett McKillop was a teacher at the Community Involved Charter School and

Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon and Dustin Lacey were students enrolled at said school. On May 16 through 18, 1996, Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon, and Dustin Lacey were guests of Wayne Emmett McKillop at his cabin located in the Pike National Forest on the property described in the Term Special Use Permit, and were under the supervision of Mr. McKillop during this trip.

7. On May 17 and 18, 1996, Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon, and Dustin Lacey, with the knowledge and permission of Wayne McKillop, camped in an area of the Pike National Forest that was not on the property described in the Term Special Use Permit, and in which camping and campfires were prohibited by the Forest Service.

8. On May 18, 1996, a forest fire ("Buffalo Creek Fire") destroyed portions of the Pike National Forest, and caused the United States to expend resources in an attempt to limit the spread of the fire and to extinguish it.

9. The Buffalo Creek Fire was caused by a campfire built and/or maintained by Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon and Dustin Lacey. The campfire was built and maintained at a location where camping and campfires were prohibited by the Forest Service.

**FIRST CLAIM FOR RELIEF**

**(Negligence)**

10. The United States incorporates the allegations in paragraphs 1 through 9 of this cross-claim, as though fully set forth herein.

11. Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon and Dustin Lacey illegally camped and started and/or maintained a campfire in an area of the Pike National Forest where camping and campfires were prohibited, and negligently failed to make sure that the campfire was fully extinguished before leaving it unattended. As a result of these acts and omissions, embers from the campfire caused a portion of the Pike National Forest to be destroyed by fire resulting in damages to the United States, including fire suppression and rehabilitation costs.

**SECOND CLAIM FOR RELIEF**

**(Liability under C.R.S. 13-21-105)**

12. The United States incorporates the allegations in paragraphs 1 through 11 of this cross-claim, as though fully set forth herein.

13. Nathan Soares, Eli Messer, Loney Martinez, Troy Glandon and Dustin Lacey are liable to the United States for the damage caused by the Buffalo Creek Fire pursuant to C.R.S. 13-21-105.

**THIRD CLAIM FOR RELIEF**

**(Liability Under Term Special Use Permit)**

14. The United States incorporate [sic] the allegations in paragraphs 1 through 11 of this cross-claim, as though fully set forth herein.

14. Wayne E. McKillop is liable to the United States for its damages suffered as a result of the Buffalo Creek Fire pursuant to the terms of the Term Special Use Permit

because the fire resulted from and related to his use of the Term Special Use Permit.

WHEREFORE, against each cross-claim defendant, jointly and severally, the United States claims damages in an amount to be determined at trial for:

a. Fire suppression costs;

b. Damage to the Pike National Forest;

c. Costs expended to rehabilitate the Pike National Forest;

d. Costs of suit; and

e. Pre-judgment and post-judgment interest.

THE UNITED STATES REQUESTS A TRIAL BY JURY ON ITS CROSS-CLAIMS

Dated this 12th day of March, 1998.

Respectfully submitted,

HENRY L. SOLANO
United States Attorney

/s/ William G. Pharo
By: WILLIAM G. PHARO
Assistant United States Attorney
1961 Stout Street, Suite 1100
Drawer 3608
Denver, Colorado 80294
Telephone: (303) 844-3885

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of March, 1998, a true and correct copy of the foregoing UNITED STATES'

AMENDED ANSWER TO THIRD AMENDED COMPLAINT AND CROSS-CLAIMS AGAINST CO-DEFENDANTS MCKILLOP, SOARES, MESSER, MARTINEZ, GLANDON AND LACY was mailed, postage prepaid, to:

James R. Florey, Jr.
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Englewood, CO 80111

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Denver, CO 80202

/s/ Valerie Nielsen
Office of the United
States Attorney

FS-2700-18 (5/89)

| USDA – Forest Service | Holder No. 5587 /01 | Type Site 123 | Authority 712 |
|---|---|---|---|
| TERM SPECIAL USE PERMIT For Recreation Residences | Auth. Type 18 | Issue Date 02/16/93 | Expir. Date 12/31/08 |
| Act of March 4, 1915, As Amended (Ref. FSM 2710) | Location Sequence No. 0212110805905 | | Stat. Ref. |
| | Latitude 39,20',00" | Longitude 105,20',00" | LOS Case |

MCKILLOP, WAYNE E. & JEANETTE L. (Holder Name) of 865 S. PENNSYLVANIA (Billing Address – 1)

(Billing Address – 2) DENVER (City) COLORADO (State) 80209 (Zip Code)

(hereinafter called the holder) is hereby authorized to use National Forest lands, for a recreation residence for personal recreational use on the Pike and San Isabel National Forest, subject to the provisions of this permit including items I through XI, on pages 2 through 8.

This permit covers .98 acres.

Described as: (1) Lot 9, BLK C of the REDSKIN/BUFFALO SUMMER HOME tract.
(A plat of which is on file in the office of the Forest Supervisor.)

*OR* (2) T.08S., R.71W., SEC 21 6TH PM
(Legal Description)
as shown on the attached map.

The following improvements, whether on or off the site, are authorized in addition to the residence structure:

Picnic Table
Horseshoe Pits
Bird Feeders
Name Plate "Dogpatch"

---

This use shall be exercised at least 15 days each year, unless otherwise authorized in writing. It shall not be used as a full-time residence to the exclusion of a home elsewhere.

**THIS PERMIT IS NOT TRANSFERABLE PURCHASERS OF IMPROVEMENTS ON SITES AUTHORIZED BY THIS PERMIT MUST SECURE A NEW PERMIT FROM THE FOREST SERVICE.**

---

**THIS PERMIT IS ACCEPTED SUBJECT TO ALL OF ITS TERMS AND CONDITIONS.**

| | | |
|---|---|---|
| **ACCEPTED:** | Wayne McKillop Jenny McKillop<br>(HOLDER'S NAME AND SIGNATURE) | 2/7/93<br>DATE |

---

| | | | |
|---|---|---|---|
| **ACCEPTED:** | Ed Ryberg<br>(AUTHORIZED OFFICER'S NAME AND SIGNATURE) | Dist. Ranger<br>TITLE | 2/16/93<br>DATE |

---

Recreation Residence

## TERMS AND CONDITIONS

### I. AUTHORITY AND USE AND TERM AUTHORIZED.

A. This permit is issued under the authority of the Act of March 4, 1915, as amended (16 U.S.C. 497), and Title 36, Code of Federal Regulations, Sections 251.50-251.64. Implementing Forest Service policies are found in the Forest Service

Directives System (FSM 2720, 2340; FSH 2709.11, Chapters 10-50). Copies of the applicable regulations and policies will be made available to the holder at no charge upon request made to the office of the Forest Supervisor.

B. The authorized officer under this permit is the Forest Supervisor, or a delegated subordinate officer.

C. This permit authorizes only personal recreation use of a noncommercial nature by the holder, members of the holder's immediate family, and guests. Use of the permitted improvements as a principal place of residence is prohibited and shall be grounds for termination of this permit.

D. Unless specifically provided as an added provision to this permit, this authorization is for site occupancy and does not provide for the furnishing of structures, road maintenance, water, fire protection, or any other such service by a Government agency, utility association, or individual.

E. Expiration at End of Term: This authorization is for a term of 20 years and will expire on *DECEMBER 31, 2008*.

**II. OPERATION AND MAINTENANCE.**

A. The authorized officer, after consulting with the holder, will prepare an operation and maintenance plan which shall be deemed a part of this permit. The plan will be reviewed annually and updated as deemed necessary by the authorized officer and will cover requirements for at least the following subjects:

1. Maintenance of vegetation, tree planting, and removal of dangerous trees and other unsafe conditions.

2. Maintenance of the facilities.
3. Size, placement and descriptions of signs.
4. Removal of garbage or trash.
5. Fire protection.
6. Identification of the person responsible for implementing the provisions of the plan, if other than the holder, and a list of names, addresses, and phone numbers of persons to contact in the event of an emergency.

## III. IMPROVEMENTS

A. Nothing in this permit shall be construed to imply permission to build or maintain any improvement not specifically named on the face of this permit or approved in writing by the authorized officer in the operation and maintenance plan. Improvements requiring specific approval shall include, but are not limited to: signs, fences, name plates, mailboxes, newspaper boxes, boathouses, docks, pipelines, antennas, and storage sheds.

B. All plans for development, layout, construction, reconstruction or alteration of improvements on the site, as well as revisions of such plans, must be prepared by a licensed engineer, architect, and/or landscape architect (in those states in which such licensing is required) or other qualified individual acceptable to the authorized officer. Such plans must be approved by the authorized officer before the commencement of any work.

## IV. RESPONSIBILITIES OF HOLDER.

A. The holder, in exercising the privileges granted by this permit, shall comply with all present and future regulations of the Secretary of Agriculture and all present and future federal, state, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit. However, the Forest Service assumes no responsibility for enforcing laws, regulations, ordinances and the like which are under the jurisdiction of other government bodies.

B. The holder shall exercise diligence in preventing damage to the land and property of the United States. The holder shall abide by all restrictions on fires which may be in effect within the forest at any time and take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during a closed fire season established by law or regulation without written permission from the authorized officer.

C. The holder shall protect the scenic and esthetic values of the National Forest System lands as far as possible consistent with the authorized use, during construction, operation, and maintenance of the improvements.

D. No soil, trees, or other vegetation may be removed from the National Forest System lands without prior permission from the authorized officer. Permission shall be granted specifically, or in the context of the operations and maintenance plan for the permit.

E. The holder shall maintain the improvements and premises to standards of repair, orderliness,

neatness, sanitation, and safety acceptable to the authorized officer. The holder shall fully repair and bear the expense for all damage, other than ordinary wear and tear, to National Forest lands, roads and trails caused by the holder's activities.

F. The holder assumes all risk of loss to the improvements resulting from acts of God or catastrophic events, including but not limited to, avalanches, rising waters, high winds, falling limbs or trees and other hazardous natural events. In the event the improvements authorized by this permit are destroyed or substantially damaged by acts of God or catastrophic events, the authorized officer will conduct an analysis to determine whether the improvements can be safely occupied in the future and whether rebuilding should be allowed. The analysis will be provided to the holder within 6 months of the event.

G. The holder has the responsibility of inspecting the site, authorized rights-of-way, and adjoining areas for dangerous trees, hanging limbs, and other evidence of hazardous conditions which could affect the improvements and or pose a risk of injury to individuals. After securing permission from the authorized officer, the holder shall remove such hazards.

H. In case of change of permanent address or change in ownership of the recreation residence, the holder shall immediately notify the authorized officer.

**V. LIABILITIES.**

A. This permit is subject to all valid existing rights and claims outstanding in third parties. The

United States is not liable to the holder for the exercise of any such right or claim.

B. The holder shall hold harmless the United States from any liability from damage to life or property arising from the holder's occupancy or use of National Forest lands under this permit.

C. The holder shall be liable for any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression. Without limiting available civil and criminal remedies which may be available to the United States, all timber cut, destroyed, or injured without authorization shall be paid for at stumpage rates which apply to the unauthorized cutting of timber in the state wherein the timber is located.

**VI. FEES.**

A. Fee Requirement: This special use authorization shall require payment in advance of an annual rental fee.

B. Appraisals:

1. Appraisals to ascertain the fair market value of the site will be conducted by the Forest Service at least every 20 years. The next appraisal will be implemented in the year *2000*.

2. Appraisals will be conducted and reviewed in a manner consistent with the Uniform Standards of Professional Appraisal Practice, from which the appraisal standards have been developed giving accurate and careful consideration to all

market forces and factors which tend to influence the value of the site.

3. If dissatisfied with an appraisal utilized by the Forest Service in ascertaining the permit fee, the holder may employ another qualified appraiser at the holder's expense. The authorized officer will give full and complete consideration to both appraisals provided the holder's appraisal meets Forest Service standards. If the two appraisals disagree in value by more than 10 percent, the two appraisers will be asked to try and reconcile or reduce their differences. If the appraisers cannot agree, the Authorized Officer will utilize either or both appraisals to determine the fee. When requested by the holder, a third appraisal may be obtained with the cost shared equally by the holder and the Forest Service. This third appraisal must meet the same standards of the first and second appraisals and may or may not be accepted by the authorized officer.

C. Fee Determination: The annual rental fee shall be determined by appraisal and other sound business management principles. (36 CFR 251.57(a)). The fee shall be 5 percent of the appraised fair market fee simple value of the site for recreation residence use.

Fees will be predicated on an appraisal of the site as a base value, and that value will be adjusted in following years by utilizing the percent of change in the Implicit Price Deflator – Gross National Product (IPD-GNP) index as of the previous June 30. A fee from a prior year will be adjusted upward or downward, as the case may

be, by the percentage change in the IPD-GNP, except that the maximum annual fee adjustment shall be 10 percent when the IPD-GNP index exceeds 10 percent in any one year with the amount in excess of 10 percent carried forward to the next succeeding year where the IPD-GNP index is less than 10 percent. The base rate from which the fee is adjusted will be changed with each new appraisal of the site, at least every 20 years.

D. Initial Fee: The initial fee may be based on an approved Forest Service appraisal existing at the time of this permit, with the present day value calculated by applying the IPD-GNP index to the intervening years.

E. Payment Schedule: Based on the criteria stated herein, the initial payment is set at $\underline{\$512.00}$ per year and the fee is due and payable annually on JANUARY 1. Payments will be credited on the date received by the designated collection officer or deposit location. If the due date(s) for any of the above payments or fee calculation statements fall on a nonworkday, the charges shall not apply until the close of business of the next workday. Any payments not received within 30 days of the due date shall be delinquent.

F. Interest and Penalties:

1. A fee owed the United States which is delinquent will be assessed interest based on the most current rate prescribed by the United States Department of Treasury Financial Manual (TFM-6-8020). Interest shall accrue on the delinquent fee from the date the fee payment was due

and shall remain fixed during the duration of the indebtedness.

2. In addition to interest, certain processing, handling, and administrative costs will be assessed on delinquent accounts and added to the amounts due.

3. A penalty of 6 percent per year shall be assessed on any indebtedness owing for more than 90 days. This penalty charge will not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

4. When a delinquent account is partially paid or made in installments, amounts received shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal.

G. Nonpayment Constitutes Breach: Failure of the holder to make the annual payment, late payment charge, or any other charges when due shall be grounds for termination of this authorization. However, no permit will be terminated for nonpayment of any monies owed the United States unless payment of such monies is more than 90 days in arrears.

H. Applicable Law: Delinquent fees and other charges shall be subject to all the rights and remedies afforded the United States pursuant to federal law and implementing regulations. (31 U.S.C. 3711 *et seq.*)

## VII. TRANSFER, SALE, AND RENTAL.

A. Nontransferability: Except as provided in this section, this permit is not transferable.

B. Transferability Upon Death of the Holder:

1. If the holder of this permit is a married couple and one spouse dies, this permit will continue in force, without amendment or revision, in the name of the surviving spouse.

2. If the holder of this permit is an individual who dies during the term of this permit and there is no surviving spouse, an annual renewable permit will be issued, upon request, to the executor or administrator of the holder's estate. Upon settlement of the estate, a new permit incorporating current Forest Service policies and procedures will be issued for the remainder of the deceased holder's term to the properly determined heir(s) as shown by an order of a court, bill of sale, or other evidence to be the owner of the improvements.

C. Divestiture of Ownership: If the holder through voluntary sale, transfer, enforcement of contract, foreclosure, or other legal proceeding shall cease to be the owner of the physical improvements, this permit shall be terminated. If the person to whom title to said improvements is transferred is deemed by the authorizing officer to be qualified as a holder, then such person to whom title has been transferred will be granted a new permit. Such new permit can be, at the discretion of the authorized officer, for a full term or for the remainder of the term of the original holder.

D. Notice to Prospective Purchasers: When considering a voluntary sale of the recreation residence, the

holder shall provide a copy of this special use permit to the prospective purchaser before finalizing the sale. The holder cannot make binding representations to the purchasers as to whether the Forest Service will reauthorize the occupancy.

E. Rental: the holder may rent or sublet the use of improvements covered under this permit only with the express written permission of the authorized officer. In the event of an authorized rental or sublet, the holder shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

**VIII. TERMINATION.**

A. Termination for Cause: This permit may be terminated for cause by the authorized officer upon breach of any of the terms and conditions of this permit or applicable law. Prior to such termination for cause, the holder shall be given notice and provided a reasonable time – not to exceed ninety (90) days – within which to correct the breach.

B. Termination in the Public Interest During the Permit Term:

1. This permit may be revoked or terminated during its term at the discretion of the authorized officer for reasons in the public interest. (36 CFR 251.60(b)). In the event of such termination in the public interest, the holder shall be given one hundred and eighty (180) days prior written notice to vacate the premises, provided that the authorized officer may prescribe a date for a shorter period in

which to vacate ("prescribed vacancy date") if the public interest objective reasonably requires the site in a shorter period of time.

2. The Forest Service and the holder agree that in the event of a termination in the public interest, the holder shall be paid damages. Termination in the public interest and payment of damages is subject to the availability of funds or appropriations.

   a. Damages in the event of a public interest termination shall be the lesser amount of either (1) the cost of relocation of the approved improvements to another site which may be authorized for residential occupancy (but not including the costs of damages incidental to the relocation which are caused by the negligence of the holder or a third party), or (2) the replacement costs of the approved improvements as of the date of termination. Replacement cost shall be determined by the Forest Service utilizing standard appraisal procedures giving full consideration to the improvement's condition, remaining economic life and location, and shall be the estimated cost to construct, at current prices, a building with utility equivalent to the building being appraised using modern materials and current standards, design and layout as of the date of termination. If the holder has received notification that the permit will not be renewed, then the amount

of damages shall be adjusted as of the date of termination by multiplying the replacement cost by a fraction which has as the numerator the number of full months remaining to the term of the permit prior to termination (measured from the date of the notice of termination) and as the denominator, the total number of months in the original term of the permit.

b. The amount of the damages determined in accordance with paragraph a. above shall be fixed by mutual agreement between the authorized officer and the holder and shall be accepted by the holder in full satisfaction of all claims against the United States under this clause: *Provided*, That if mutual agreement is not reached, the authorized officer shall determine the amount and if the holder is dissatisfied with the amount to be paid may appeal the determination in accordance with the Appeal Regulations (36 CFR 251.80) and the amount as determined on appeal shall be final and conclusive on the parties hereto: *Provided further*, That upon the payment to the holder of the amount fixed by the authorized officer, the right of the Forest Service to remove or require the removal of the improvements shall not be stayed pending final decision on appeal.

**IX. RENEWAL.**

A. This permit may be renewed for another term up to 20 years in duration if the site is still being used

for the purposes previously authorized and is being continually operated and maintained in accordance with all the provisions of the permit. In making a renewal, the authorized officer may modify the terms, conditions, and special stipulations to reflect any new requirements imposed by current federal and state land use plans, laws, regulations, or other management decisions. (36 CFR 251.64).

B. The authorized officer may decide to renew this authorization at any time prior to the expiration date of this permit.

## X. RIGHTS AND RESPONSIBILITIES UPON TERMINATION

A. Removal of Improvements Upon Termination: At the end of the term of occupancy authorized by this permit, or upon abandonment, or termination for cause, Act of God, or catastrophic event, or in the public interest, the holder shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall return the site to a condition approved by the authorized officer unless otherwise agreed to in writing or in this permit. If the holder fails to remove all such structures or improvements within a reasonable period – not to exceed one hundred and eighty (180) days from the date the authorization of occupancy is ended – the improvements shall become the property of the United States, but in such event, the holder remains obligated and liable for the cost of their removal and the restoration of the site.

## XI. MISCELLANEOUS PROVISIONS

A. This permit replaces a special use permit issued to:

FRED J. KAMM & ADAM KAMM (Holder Name) on OCTOBER 04, 1990 (Date)

B. The Forest Service reserves the right to enter upon the property to inspect for compliance with the terms of this permit. Reports on inspection for compliance will be furnished to the holder.

C. Issuance of this permit shall be construed as an admission by the Government as to the title to any improvements. The Government disclaims any liability for the issuance of any permit in the event of disputed title.

D. If there is a conflict between the foregoing standard printed clauses and any special clauses added to the permit, the standard printed clauses shall control.

E. The holder agrees to permit the free and unrestricted access to and upon the premises at all times for all lawful and proper purposes not inconsistent with the intent of the permit or with the reasonable exercise and enjoyment by the holder of the privileges thereof.

F. Timely payment of fees is of essence. This permit shall terminate by operation of law if payment in full is not received by the due date.

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**Colo. Rev. Stat. § 24-10-109. Notice required – contents – to whom given – limitations.** (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

(2) The notice shall contain the following:

(a) The name and address of the claimant and the name and address of his attorney, if any;

(b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;

(c) The name and address of any public employee involved, if known;

(d) A concise statement of the nature and the extent of the injury claimed to have been suffered;

(e) A statement of the amount of monetary damages that is being requested.

(3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing

body of the public entity or the attorney representing the public entity. Such notice shall be effective upon mailing by registered mail or upon personal service.

(4) When the claim is one for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin of the deceased.

(5) Any action brought pursuant to this article shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., relating to limitation of actions, or it shall be forever barred; except that, if compliance with the provisions of subsection (6) of this section would otherwise result in the barring of an action, such time period shall be extended by the time period required for compliance with the provisions of subsection (6) of this section.

(6) No action brought pursuant to this article shall be commenced until after the claimant who has filed timely notice pursuant to subsection (1) of this section has received notice from the public entity that the public entity has denied the claim or until after ninety days has passed following the filing of the notice of claim required by this section, whichever occurs first.

**Colo. Rev. Stat. § 24-10-118. Actions against public employees – requirements and limitations.** (1) Any action against a public employee, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant and which arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, unless the act or omission causing such injury was willful and wanton, shall be subject to the following requirements and limitations, regardless of whether or not such action against a public employee is one for which the public entity might be liable for costs of defense, attorney fees, or payment of judgment or settlement under section 24-10-110:

(a) Compliance with the provisions of section 24-10-109, in the forms and within the times provided by section 24-10-109, shall be a jurisdictional prerequisite to any such action against a public employee, and shall be required whether or not the injury sustained is alleged in the complaint to have occurred as the result of the willful and wanton act of such employee, and failure of compliance shall forever bar any such action against a public employee. Any such action against a public employee shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., relating to limitation of actions, or it shall be forever barred.

(b) The maximum amounts that may be recovered in any such action against a public employee shall be as provided in section 24-10-114(1), (2), and (3).

(c) A public employee shall not be liable for punitive or exemplary damages arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton.

(d) The fact that a plaintiff sues both a public entity and a public employee shall not be deemed to increase any of the maximum amounts that may be recovered in any such action as provided in this section or in section 24-10-114.

(2)(a) A public employee shall be immune from liability in any claim for injury, whether brought pursuant to this article, section 29-5-111 C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that no such immunity may be asserted in an action for injuries resulting from the circumstances specified in section 24-10-106(1).

(b) Any member of any state board, commission, or other advisory body appointed pursuant to statute, executive order, or otherwise, and any other person acting as a consultant or witness before any such body, shall be immune from liability in any civil action brought against said person for acts occurring while the person was acting as such a member, consultant, or witness, if such person was acting in good faith within the scope of such person's respective capacity, makes a reasonable effort to obtain the facts of the matter as to which action was taken, and

acts in the reasonable belief that the action taken by such person was warranted by the facts.

(2.5) If a public employee raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery; except that any discovery necessary to decide the issue of sovereign immunity shall be allowed to proceed, and the court shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

(3) Nothing in this section shall be construed to allow any action which lies in tort or could lie in tort regardless of whether that may be the type of action or the form or relief chosen by a claimant to be brought against a public employee except in compliance with the requirements of this article.

(4) The immunities provided for in this article shall be in addition to any common-law immunity applicable to a public employee.

(5) Notwithstanding any provision of this article to the contrary, a public entity may, if it determines by resolution adopted at an open public meeting by the governing body of the public entity that it is in the public interest to do so, defend a public employee against a claim for punitive damages or pay or settle any punitive damage claim against a public employee.

**16 U.S.C. § 497. Use and occupation of lands for hotels, resorts, summer homes, stores, and facilities for industrial, commercial, educational or public uses**

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purposes of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general

public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests.

36 CFR § 251.56 Terms and conditions.

(a) General.

(1) Each special use authorization must contain:

(i) Terms and conditions which will:

(A) Carry out the purposes of applicable statutes and rules and regulations issued thereunder;

(B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;

(C) Require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and

(D) Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.

(ii) Such terms and conditions as the authorized officer deems necessary to:

(A) Protect Federal property and economic interests;

(B) Manage efficiently the lands subject to the use and adjacent thereto;

(C) Protect other lawful users of the lands adjacent to or occupied by such use;

(D) Protect lives and property;

(E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;

(F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and

(G) Otherwise protect the public interest.

Note to paragraph (a)(1)(ii)(G): The Department is making explicit its preexisting understanding of § 251.56(a)(1)(ii)(G) of this subpart in the context of authorizing noncommercial group uses of National Forest System lands. Section 251.56(a)(1)(ii)(G) provides that each special use authorization shall contain such terms and conditions as the authorized officer deems necessary to otherwise protect the public interest. In the context of noncommercial group uses, the Forest Service interprets the term "public interest" found in § 251.56(a)(1)(ii)(G) to refer to the three public interests identified by the Forest Service on August 30, 1995. These public interests include the protection of resources and improvements on National Forest System lands, the allocation of space among potential or existing uses and activities, and pubic health and safety concerns. Under this construction, § 251.56(a)(1)(ii)(G) allows the Forest Service to impose terms and conditions that are not specifically addressed in § 251.56(a)(1)(ii)(A)-(F) but only those that further these public interests. The Forest Service shall implement and enforce § 251.56(a)(1)(ii)(G) in accordance with this interpretation.

(2) Authorizations for use of National Forest System lands may be conditioned to require State, county, or other Federal agency licenses, permits, certificates, or other approval documents, such as a Federal Communication

Commission license, a Federal Energy Regulatory Commission license, a State water right, or a county building permit.

(b) Duration and renewability –

(1) Requirements. If appropriate, each special use authorization will specify its duration and renewability. The duration shall be no longer than the authorized officer determines to be necessary to accomplish the purpose of the authorization and to be reasonable in light of all circumstances concerning the use, including (i) resource management direction contained in land management and other plans; (ii) public benefits, provided; (iii) cost and life expectancy of the authorized facilities; (iv) financial arrangements for the project; and (v) the life expectancy of associated facilities, licenses, etc. Except for special use authorizations issued under the National Forest Ski Area Permit Act of 1986, authorizations exceeding 30 years shall provide for revision of terms and conditions at specified intervals to reflect changing times and conditions.

(2) Ski area permits.

(i) For authorizations issued under the National Forest Ski Area Permit Act of 1986, the authorized officer normally shall issue a ski area authorization for 40 years, if, upon consideration of information submitted by the applicant, the authorized officer finds that the ski area development meets the following standards:

(A) In the case of an existing permit holder, existing onsite investment is of sufficient magnitude to justify authorization for 40 years;

(B) In the case of an existing permit holder, existing investment of capital is in ski-related facilities;

(C) Planned investment capital is directly related to development of ski area facilities and is not for financing regular, ongoing operation and maintenance costs;

(D) Ski facilities requiring long-term investment are, or will be, located predominately on land authorized under a permit;

(E) The number and magnitude of planned facilities, as detailed in a Master Development Plan, clearly require long-term financing and/or operation;

(F) The United States is not the owner of the principal facilities within the authorized ski area.

(ii) A term of less than 40 years shall be authorized for a ski area when the applicant requests a shorter term or when, in the authorized officer's discretion:

(A) Analysis of the information submitted by the applicant indicates that a shorter term is sufficient for financing of the ski area;

(B) The ski area development, whether existing or proposed, does not meet the standards of paragraph 2(i)(A)-(F) of this section; or

(C) A 40-year authorization would be inconsistent with the approved forest land and resource management plan governing the area (36 CFR Part 219).

(c) Preconstruction approvals. Forest Service approval of location, design and plans (or standards, if appropriate) of all developments within the authorized area will be required prior to construction.

(d) Liability. Holders shall pay the United States for all injury, loss, or damage, including fire suppression costs, in accordance with existing Federal and State laws.

(1) Holders shall also indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy.

(2) Holders of special use authorizations for high risk use and occupancy, such as, but not limited to, powerlines and oil and gas pipelines, shall be held liable for all injury, loss, or damage, including fire suppression costs, caused by the holder's use or occupancy, without regard to the holder's negligence, provided that maximum liability shall be specified in the special use authorization as determined by a risk assessment, prepared in accordance with established agency procedures, but shall not exceed $1,000,000 for any one occurrence. Liability for injury, loss, or damage, including fire suppression costs, in excess of the specified maximum shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage or injury occurred.

(e) Bonding. An authorized officer may require the holder of a special use authorization for other than a noncommercial group use to furnish a bond or other security to secure all or any of the obligations imposed by the terms of the authorization or by any applicable law, regulation or order.

(f) Special terms and conditions.

(1) Public service enterprises. Special use permits authorizing the operation of public service enterprises shall require that the permittee charge reasonable rates and

furnish such services as may be necessary in the public interest, except where such rates and services are regulated by Federal, State or municipal agencies having jurisdiction.

(2) Common carriers. Oil and gas pipelines and related facilities authorized under section 28 of the Mineral Leasing Act of 1920, 41 Stat. 449, as amended (30 U.S.C. 185), shall be constructed, operated and maintained as common carriers. The owners or operators of pipelines shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or nonfederal lands. In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported, or purchased. The common carrier provisions of this section shall not apply to any natural gas pipeline operated (i) by any person subject to regulation under the Natural Gas Act, 52 Stat. 821, as amended, (15 U.S.C. 717) or (ii) by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality. Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipeline companies is offered for sale, each pipeline company shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

(g) Conversion of Ski Area Authorizations.

(1) The Forest Service shall request that all existing permit holders convert existing authorizations for ski

areas to a new authorization issued pursuant to the National Forest Ski Area Permit Act.

(2) Any current holder of a ski area permit who wishes to convert an existing permit to one issued pursuant to the National Forest Ski Area Permit Act must submit a written request for the new authorization to the authorized officer.

(3) With the consent of the holder, the authorized officer shall convert the authorization if:

(i) The holder is in compliance with the existing authorization;

(ii) All fees currently due under the existing authorization are paid in full; and

(iii) Any proposed modifications of terms and conditions of the existing authorization included in a request for conversion meet the standards of paragraphs (2)(i)(A) through (F) of this section and the relevant requirements of this subpart.

(4) A holder retains the right to decline a new authorization offered pursuant to this paragraph and to continue to operate under the terms of the existing permit. However, pursuant to the rules at § 251.61 of this subpart, major modifications of existing permits shall require conversion to a permit issued under the authority of the National Forest Ski Area Permit Act, unless the holder provides compelling justification for retaining the existing permit.

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(2)

Supreme Court, U.S.
FILED

MAY 14 2003

OFFICE OF THE CLERK

No. 02-1178

# In the Supreme Court of the United States

WAYNE EMMETT MCKILLOP, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

The United States brought suit against petitioner, who held a Forest Service permit authorizing his personal recreational use of certain land in the Pike National Forest, to recover damages arising out of his use of the permit, including the costs of suppressing a forest fire started by his guests. The question presented is whether the United States' suit is barred by a state law requiring claims against public employees to be asserted within 180 days after discovery of the injury.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 11 |


TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988) | 5, 6, 7 |
| *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943) | 6 |
| *Felder* v. *Casey*, 487 U.S. 131 (1988) | 8, 9 |
| *United States* v. *California*, 655 F.2d 914 (9th Cir. 1980) | 9, 10 |
| *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) | 6, 7 |
| *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947) | 6 |
| *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966) | 7 |


Constitution, statutes and regulations:


| | |
|---|---|
| U.S. Const. Art. IV, § 3, Cl. 2 | 5 |
| 16 U.S.C. 497 | 2, 5 |
| 28 U.S.C. 2415 | 7 |
| 28 U.S.C. 2415(a) | 4, 6, 7 |
| 28 U.S.C. 2415(b) | 6, 8, 10 |
| 42 U.S.C. 1983 | 8 |
| Colorado Governmental Immunity Act, Colo. Rev. Stat. Ann. §§ 24-10-101 *et seq.* (2001) | 3 |
| § 24-10-109 | 3, 8 |
| § 24-10-118(1)(a) | 3, 8 |
| § 24-10-118(2)(a) | 3, 8 |

Regulations—Continued: Page

36 C.F.R.:

Section 251.52 ..... 2
Section 251.53 ..... 3
Section 251.56(a)(1)(ii) ..... 2, 5
Section 251.56(d) ..... 2
Section 251.56(d)(1) ..... 2, 6, 7

# In the Supreme Court of the United States

No. 02-1178

WAYNE EMMETT MCKILLOP, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 301 F.3d 1270. The opinion of the district court (Pet. App. 15a-70a) is reported at 53 F. Supp. 2d 1056.

### JURISDICTION

The judgment of the court of appeals was entered on September 5, 2002. A petition for rehearing was denied on November 8, 2002 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on February 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Secretary of Agriculture is authorized, upon such terms and conditions as she may deem proper, to permit the use and occupancy of land within the national forests for specified purposes, including for "constructing or maintaining summer homes." 16 U.S.C. 497(b). The Secretary has delegated to the Forest Service the authority to issue permits for such purposes, which are referred to as "special use authorizations" or "special use permits." See 36 C.F.R. 251.52, 251.53.

Under regulations promulgated by the Secretary, each permit must contain, *inter alia*, "[s]uch terms and conditions as the authorized officer deems necessary to * * * [p]rotect Federal property and economic interests." 36 C.F.R. 251.56(a)(1)(ii). The regulations provide that each permit holder "shall pay the United States for all injury, loss, or damage, including fire suppression costs, in accordance with existing Federal and State laws," 36 C.F.R. 251.56(d), and "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy," 36 C.F.R. 251.56(d)(1).

2. In February 1993, the Forest Service issued a 20-year special use permit to petitioner and his wife. The permit authorizes their personal recreational use of approximately one acre of land, including a cabin, in the Pike National Forest in Colorado. The permit states that "[t]he holder shall be liable for any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression." Pet. App. 84a; see C.A. App. 54-61.

In May 1996, petitioner, a public school teacher, allowed 16 students from his school to visit his cabin. The students were under petitioner's supervision during the visit. Pet. App. 3a, 84a-85a.

With petitioner's permission, five of the students camped overnight in an area of the Pike National Forest that adjoined the property described in petitioner's permit. Although the Forest Service prohibited campfires at that location, the students built a campfire there. The campfire caused a forest fire that destroyed portions of the Pike National Forest, damaged and destroyed private property, and caused the United States to expend substantial resources to extinguish the fire. Pet. App. 3a, 85a-86a.

3. Private owners whose property was damaged by the fire filed suit in federal district court against the United States, petitioner, and others. Pet. App. 4a. The United States filed a cross-claim against petitioner, alleging that he was liable under the special use permit for fire suppression costs and damage to the Pike National Forest. *Id.* at 86a-87a.

Petitioner moved to dismiss the cross-claim, relying on the Colorado Governmental Immunity Act (CGIA), Colo. Rev. Stat. Ann. §§ 24-10-101 *et seq.* (2001). The CGIA confers immunity from tort claims on public employees acting within the scope of their employment, unless their conduct was willful and wanton. See *id.* § 24-10-118(2)(a). Even for willful and wanton conduct, the CGIA provides that a claim is barred if notice of the claim was not given within 180 days of the discovery of the injury. See *id.* §§ 24-10-109, 24-10-118(1)(a).

The district court granted petitioner's motion. Pet. App. 15a-74a. The court held that a reasonable jury could find that petitioner's conduct was willful and wanton, and thus did not dismiss the claim on immunity

grounds. See *id.* at 40a-46a. The court held, however, that the CGIA's notice-of-claim requirement defeated the United States' claim. *Id.* at 55a-59a. The court recognized that "where a plaintiff has stated a federal claim * * * a notice of claim provision may be struck down based on supremacy because allowing a federal claim to be limited by state law would defeat the objective of the federal law." *Id.* at 58a. The court reasoned, however, that the United States' claim was "properly construed as a state tort claim alleging damages as a result of [petitioner's] alleged negligence." *Id.* at 57a. Accordingly, the court held that the claim was barred because the United States had not, as the CGIA requires, filed a notice of claim within 180 days of its discovery. *Ibid.*[1]

4. The court of appeals reversed. Pet. App. 1a-14a. The court reasoned that the United States' claim against petitioner is "essentially a contract claim" based on petitioner's special use permit and, consequently, is governed by federal, not state, law. *Id.* at. 13a. After noting that "where federal and state laws are in conflict, the Supremacy Clause of the United States Constitution requires that the federal limitation prevail," the court held that 28 U.S.C. 2415(a), the six-year statute of limitations governing contract actions by the United States, preempts the CGIA's 180-day notice of claim requirement. *Ibid.*

## ARGUMENT

The court of appeals correctly held that the United States' suit against petitioner to enforce the terms of a

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[1] After the other claims in the case were settled or dismissed, the court entered final judgment against the United States. Pet. App. 4a.

Forest Service special use permit was not subject to the state-law requirement that notice of a claim against a public employee be given within 180 days of its discovery. That holding does not conflict with any decision of this Court or any other court of appeals. The petition should, therefore, be denied.

1. Petitioner asserts that the court of appeals erred in holding that the Colorado notice-of-claim requirement could not be applied to defeat the United States' suit, suggesting that no "significant conflict" exists between any "federal policy or interest and the [operation] of the state law." Pet. 6 (quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988)), 14-15. Petitioner is mistaken.

a. The United States' authority to administer public lands, including the authority to permit the use of those lands subject to conditions designed to preserve them, derives from the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

Congress has authorized the Secretary of Agriculture to permit the use and occupancy of land within national forests on such terms and conditions as she may deem proper. See 16 U.S.C. 497. Pursuant to that authority, the Secretary has promulgated regulations requiring that permits contain "[s]uch terms and conditions as the authorized officer deems necessary to * * * [p]rotect Federal property and economic interests." 36 C.F.R. 251.56(a)(1)(ii). Those regulations specifically require that permit holders "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judg-

ments caused by the holder's use or occupancy." 36 C.F.R. 251.56(d)(1). Consistent with those regulations, the permit issued to petitioner made him liable for "any damage suffered by the United States resulting from or related to use of this permit, including damages to National Forest resources and costs of fire suppression." Pet. App. 84a.

Congress has also expressly addressed the appropriate statute of limitations for contract actions by the United States, 28 U.S.C. 2415(a), and tort actions by the United States "to recover damages resulting from fire to [public] lands," 28 U.S.C. 2415(b). The limitations period for both types of actions is six years.

b. The United States brought this suit to enforce its rights under a federal permit issued pursuant to federal regulations for the use of federal land. It would be difficult to posit a matter more pervasively federal in character. This Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). As particularly relevant here, the "rights of the United States under its contracts are governed exclusively by federal law." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); see *United States* v. *Standard Oil Co.*, 332 U.S. 301, 306 (1947) (noting "the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries"); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). The timeliness of such actions is governed by 28 U.S.C. 2415(a).

To be sure, controversies "directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform

federal rules." *Kimbell Foods*, 440 U.S. at 727-728. Thus, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision," unless the "application of state law would frustrate specific objectives of the federal programs." *Id.* at 728. State law cannot be applied, however, if "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *Boyle*, 487 U.S. at 507 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (alteration in *Boyle*). Although some such conflict must exist, the "conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." *Ibid.*[2]

c. Under the analysis previously articulated by the Court, federal law preempts the tort immunities that Colorado confers on public employees. Federal law requires holders of special use permits for national forests to indemnify the United States for damage and fire suppression costs that result from or relate to use of the permit, see 36 C.F.R. 251.56(d)(1), and gives the United States six years to investigate claims and to sue permit holders for damage caused by fire, see 28 U.S.C. 2415. The six-year limitations period applies regardless of whether the action against petitioner is regarded as one founded upon a contract, see 28 U.S.C. 2415(a), or one founded upon a tort, because Congress has pro-

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[2] Thus, in *Boyle*, the Court held that state tort law could not be applied in a private suit against a government contractor that supplied allegedly defective military equipment to the United States under government specifications. See 487 U.S. at 509. The Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512.

vided a special statute of limitations that gives the United States six years to bring a tort action "to recover damages resulting from fire to [public] lands," see 28 U.S.C. 2415(b). Federal law thus gives permit holders a strong incentive to take adequate fire prevention measures.

By contrast, when the permit holder is a Colorado public employee acting within the scope of his employment, the CGIA would give the permit holder immunity unless his conduct was willful and wanton. See Colo. Rev. Stat. Ann. § 24-10-181(2)(a) (2001). It would also allow the permit holder to avoid liability even for willful and wanton conduct whenever the United States was unable to assert its claim within 180 days. See *id.* §§ 24-10-109, 24-10-118(1)(a). Those provisions would prevent the United States from seeking damages from such permit holders in many circumstances, and thus would undermine the incentive to exercise caution that is central to the federal permit program. Those provisions cannot, therefore, be applied to defeat the United States' claim.

That conclusion follows from *Felder* v. *Casey*, 487 U.S. 131, 144-146 (1988), which held that a state notice-of-claim requirement could not be applied to defeat a state court action brought under 42 U.S.C. 1983. Although the statute of limitations for Section 1983 claims is borrowed from state law, and although the plaintiff had brought suit in state court, the Court held that the notice-of-claim provision "conflicts in both its purpose and effects with the remedial objectives of § 1983" and thus was preempted. 487 U.S. at 138. The case for preemption is even stronger here because the

six-year statute of limitations is supplied by a federal statute rather than borrowed from state law.[3]

2. Petitioner also asserts that the Tenth Circuit's decision in this case "directly conflicts" with the Ninth Circuit's decision in *United States* v. *California*, 655 F.2d 914 (1980). Pet. 8. Petitioner is mistaken.

In the *California* case, the Ninth Circuit held that a state notice-of-claim requirement could be applied to defeat the United States' suit arising out of a forest fire that was caused by public employees. In contrast to this case, the United States' suit against California was not founded upon a permit. It was instead a simple tort suit in which the court "borrowed" the state fire-suppression statute to supply the elements of the cause of action. See 655 F.2d at 916-917. The court concluded that, "if state law is to be borrowed to fashion the federal rule of decision in this case, the law applicable to the federal government must include the state's claim filing statutes as well as the fire suppression costs statute." *Id.* at 919.

There is no similar need to "borrow" state law to supply a rule of decision in this case. The terms of petitioner's liability are set by the permit itself, which implements federal law. Consequently, this case differs from *California* on grounds central to the Ninth Circuit's analysis.

In the United States' view, *California* was wrongly decided. The Ninth Circuit recognized that Congress

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[3] It is thus unsurprising that petitioner conceded before the district court that "[t]o require notice of claim as a condition precedent of [a federal] suit" would "unduly interfere with the federal action." Gov't C.A. App. 49; see *ibid.* ("[T]he rationale is that allowing a federal claim to be limited by state law would defeat the objective of the federal law.") (citing *Felder*, 487 U.S. at 153).

had enacted a special statute of limitations that gives the United States six years to bring a tort suit to recover damages to federal lands resulting from fires. See 655 F.2d at 919 (citing 28 U.S.C. 2415(b)). The court opined that the "only federal interest infringed by requiring compliance" with the state notice requirement "would be its interest in preparing claims and litigation at a more leisurely pace," and that such infringement was not a sufficient reason to override the State's "more restrictive time requirements." *Ibid.* In so reasoning, the court gave inadequate deference to the congressional judgment, embodied in Section 2415(b), that it is impracticable for the United States to assert claims arising out of fires on federal lands under such "restrictive time requirements." The court also failed to appreciate that the United States' interests are not confined to having adequate time to investigate and prepare its claims. If the United States' ability to seek and recover damages from fires on federal lands is diminished, the incentive for persons to exercise caution on such lands is diminished. Thus, the special limitations period for claims for damages resulting from fires advances not only the United States' interest in financial recovery but also its interest in protecting the national forests and other public lands.

*California* was decided more than two decades ago. There is some question whether the Ninth Circuit would continue to adhere to that decision in light of this Court's subsequent decisions in *Boyle* and *Felder*. In any event, the decision in this case presents no square conflict with *California* and would not be a suitable vehicle for addressing the issue presented in that case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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